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ABSTRACT

This monograph explores, through two studies, the major issues and mechanics of adult pre-trial intervention programs for non-addict criminal defendents. Part I draws upon an evaluation of research on pre-trial services which aimed at: (1) evaluating the internal and external validity of each study; (2) evaluating the policy utility of specific studies bearing on given policy instruments; and (3) providing decision makers with an assessed research base for alternative policy actions. The complete results of this study are reported in two volumes referenced in the bibliography. Part II describes the mechanics of the pre-trial intervention design in three communities, based on available documentation and brief on-site visits. The section includes: (1) an overview of the major operating components of all three programs, highlighting both their common and distinctive features; and (2) separate descriptions of the selection, service delivery and termination procedures at each site. The specific programs are presented merely as being illustrative of the intervention design. (Author/SE)

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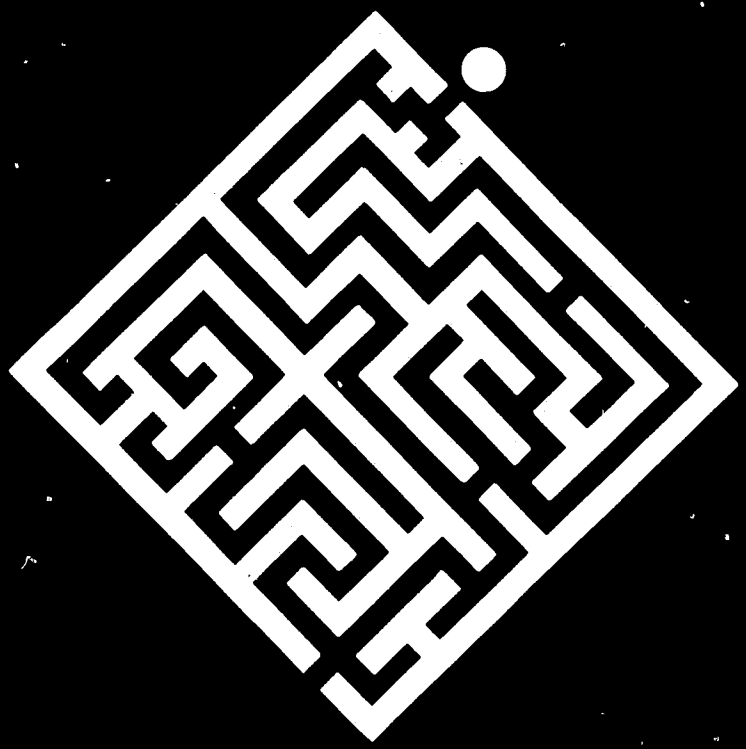

The Dilemma of Diversion

Resource Materials on Adult Pre-Trial Intervention Programs

U.S. Department of Justice
Law Enforcement Assistance Administration
National Institute of Law Enforcem
and Criminal Justice

MONOGRAPH

THE DILEMMA OF DIVERSION

Resource Materials on Adult
Pre-Trial Intervention Programs

By

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FOREWORD

Over the past decade, "diversion" has become a favored term used to describe any number of procedures designed to provide accused or convicted offenders with an alternative to traditionally prescribed correctional actions. The subject of this Monograph is Pre-Trial Diversion, an increasingly popular strategy for providing selected criminal court cases with access to rehabilitative services in lieu of normal prosecution.

Certainly, the goals of pre-trial diversion are compelling: to reduce caseload pressures; to provide selected defendants with an opportunity to avoid the consequences of a criminal conviction; to reduce recidivism. Yet surrounding the practice of diversion are many important, unanswered questions regarding its effects and consequences. This Monograph raises a number of those questions. Through a review of the diversion process and the findings of early evaluation efforts, it expresses some serious reservations about the achievements of pre-trial diversion programs.

Monographs sponsored by the National Institute are designed to inform the criminal justice community about significant findings or developments in law enforcement, court or correctional practices. Formal pre-trial diversion practice is a court-based correctional activity with less than 10 years of experience. More rigorous evaluation of this technique should be an issue of concern to both practitioners and criminal justice administrators.

Gerald Caplan
Director
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INTRODUCTION

In the literature of court reform projects, "no word has had quite the power of 'diversion' which offers the promise of the best of all worlds: cost savings, rehabilitation and more humane treatment." [1] This monograph is concerned with adult pre-trial intervention or diversion programs that deal with the general population of non-addict criminal defendants. Such diversion practice is not "true" diversion which places the divertee out of the reach of criminal sanctions, making him, in the candid view of one observer, "technically free to tell the diverter to go to hell." [2] Rather, it is diversion that occurs inside the pre-trial process, suspending its participants in an extra-legal or non-judicial proceeding that may—— if all goes well---result in non-prosecution.

Pre-trial diversion is a concept that has evolved over the years "from a long-standing but informal and low-visibility discretionary practice of prosecutors. . . ; to a widely-endorsed theory and formal reform concept beginning in 1967; to the subject of a wide variety of experimental projects and self-reports in the early 1970's; to the target of intensive and critical research in the past year or two."[3] Paradoxically, it is a concept that may have been handicapped from the start by the enormous complexity of the problems it has promised to solve.

Two papers exploring the major issues and mechanics of adult pre-trial intervention programs are presented here. Part I is drawn from an evaluation of research on pre-trial services prepared with the support of the National Science Foundation.[4] Based on an examination of available research and evaluation documents, this paper attempts to define just what is known regarding the effectiveness, efficiency and equity of alternative programs. Regrettably, enthusiasm for diversion has grown with surprisingly little validated support from the evaluation literature.

Thus, Part I is largely a commentary on the unknown which necessarily questions the range of benefits optimistically cited by diversion proponents.

Part II describes the mechanics of the pre-trial intervention design in three communities. Based on available documentation and brief on-site visits conducted at the request of the National Institute of Law Enforcement and Criminal Justice, LEAA, this section begins with an overview of the major operating components of all three programs highlighting both their common and distinctive features. The summary is followed by separate descriptions of the selection, service delivery and termination procedures in each site. Although it is tempting to designate one or more of these programs as the best of the lot, they are not intended to represent either the best or the worst of diversion experience. They are merely illustrative of the intervention design, a design that has yet to reveal whether the specifics of its execution should be embraced or abandoned.

PART I
SYNTHESIS OF PRE-TRIAL INTERVENTION RESEARCH AND POLICY ISSUES*

*This paper is based on work supported by an award from the National Science Foundation, to evaluate past research in the field of Pre-Trial services considered of use to policy makers at the local, state, and federal levels. The goals of this project were to: 1) Evaluate the internal validity of each study by determining whether the research used appropriate methods and data to deal with the questions asked; 2) Evaluate the external validity of the research by determining whether the results were credible in the light of other valid policy-related research; 3) Evaluate the policy utility of specific studies or sets of studies bearing on given policy instruments; 4) Provide decision makers, including research funders, with an assessed research base for alternative policy actions in a format readily interpretable and useable by decision makers. The full results of this study are reported in two volumes referenced in the bibliography.

The views expressed in this article are those of the authors and should not be attributed to NSF. The study on which this paper is based is one in a series of 40 NSF-supported projects assessing policy research in the field of municipal systems and human resources. The other studies range from the evaluation of policy-research on the effectiveness of juvenile delinquency programs to an evaluation of research in the area of residential solid waste management. Persons interested in receiving a list describing the 40 policy-research evaluation projects should write: RANN Document Center, National Science Foundation, 1800 G Street, N.W., Washington, D.C. 20550.

PRE-TRIAL INTERVENTION OR DIVERSION: OBJECTIVES AND PRACTICE

In recent years, a great deal of public and professional attention has been focused on the congestion and delay in criminal courts, on the harsh and often unnecessary restrictions placed on defendants awaiting trial, and for many of those defendants, the social and economic consequences of full criminal prosecution. These problems have generated a number of strategies to reform traditional methods of dealing with the accused during the period between arrest and adjudication:

- To improve arbitrary and discriminatory money bail practices, procedures to permit the release of more persons on their own recognizance were tested by the Vera Institute through the Manhattan Bail project, and subsequently adopted by other jurisdictions as a model pre-trial reform;[5]

- To extend the release perogative to defendants who might not meet the requirements for unconditional freedom, reporting conditions were attached to the release decision in many jurisdictions; [6]

- To use the arrest incident itself as a means of identifying defendants in need of treatment (or at the very least, those *not* in need of criminal prosecution), intervention and diversion schemes evolved. No longer simply a means of securing the release of appropriate defendants, these alternatives added the goals of case screening and rehabilitation to the pre-trial process.[7]

The basic feature that distinguishes formal diversion from other pre-trial release alternatives is the use of deferred prosecution as an incentive for the successful completion of the pre-trial period. In eligible cases, prosecution is delayed for periods ranging from three months to one year; contingent upon satisfactory pre-trial performance (no arrests and/or cooperation with a rehabilitation program), defendants are rewarded with the possibility of a dismissal of pending charges. Often regarded as a method of standardizing traditional discretionary diversion practice, [8] formal diversion programs generally incorporate specified eligibility criteria, a treatment regime, and the opportunity to monitor and control the decision not to prosecute. The goal is not to ensure appearance in court, but rather to avoid the necessity for continued court intervention.

Although pre-trial "intervention" and "diversion" are frequently used interchangably, for the purposes of this review, it is useful to distinguish the two as follows:

> *Diversion:* Based on the traditional discretionary authority of the prosecutor or the court, the primary function of diversion is that of case screening. The objective is to conserve official criminal justice resources for those requiring close control and supervision removing from the sanction of the court defendants who may not require a full criminal disposition.
>
> *Intervention:* Although diversion occurs, the primary function is rehabilitation. The objective is to identify defendants in need of treatment and to deliver the requisite services with the expectation of providing a more effective alternative to normal criminal or juvenile justice system processing. [9]

Thus, diversion implies the removal of minimal risk cases from overloaded court dockets, while intervention implies the removal and treatment of defendants who require service and presumably represent a greater level of risk to the community. The minimal risk strategy seeks to choose those least likely to recidivate while the treatment strategies seek to choose those defendants whose criminal careers might be influenced by the delivery of services.

In practice, most programs incorporate both objectives. Established as multi-service, community-based treatment alternatives, they are prepared to receive clients in need of intensive assistance. At the same time, beholden to diversion, they must select their targets carefully to honor the trust of the court and the safety of the community. What we may see then is not the simple removal of minimal risks from the court and the treatment of higher risks, but more often, the exclusion of higher risks from treatment programs and the delivery of services to lesser risks.

Predictably, such a result has offered many programs little opportunity to demonstrate their rehabilitative potential or their ability to reach and assist those accused persons traditionally at a disadvantage when the more conventional release decisions are made. As a consequence, the new pre-trial programs have not conveniently fit into an orderly bail reform scheme that would provide progressively more supervision and control over the release of successively higher risk defendants. More often, a program appears as a generalized pre-trial service agency that may derive some of its participants from those already eligible for unsupervised release, others from those who might satisfy minimal conditional release requirements and perhaps still others from those who might be candidates for pre-trial detention. [10]

More than simple release prior to trial, diversion offers release with the possibility of no trial. Thus it operates not only in conjunction with the decision whether or not to release, but also as an adjunct to the decision whether or not to prosecute. To both decisions it adds the prospect of intervention and service delivery. [11] A review of the development and operations of several major programs will illustrate the dilemma that has evolved as these decisions have merged to produce diversion candidates.

Manpower-Based Pre-Trial Intervention: The Manhattan and Crossroads Projects

Developed in 1967, The Manhattan Court Employment Project and Project Crossroads in Washington, D.C., were among the first experimental efforts to offer deferred prosecution supplemented by a structured program of pre-trial services. Initially sponsored by the Department of Labor (through the Vera Institute and the National Committee for Child-

ren and Youth, respectively), both projects were designed to deliver manpower development services--counseling, job placement and access to job training and educational opportunities--to youthful unemployed defendants.

Measured against any single pre-trial reform effort, the multiple ambitions of the early manpower service programs were extraordinary. An evaluation report on Project Crossroads describes the range of benefits that were expected.

> "Alleviation of congested court calendars and flexibility in case processing were foreseen as relatively immediate benefits by the introduction of a pre-trial diversion program into the District of Columbia court system. Longer-range benefits anticipated, in addition to the reduction of costs incurred in the prosecution, detention, trial and incarceration of individuals 'processed' in the usual manner, included altering the image of the courts in the eyes of the accused and the community... The participant, for his part, was provided an alternative to a permanently recorded label of 'delinquent' or 'criminal,' as well as an avenue through which to gain a foothold in the legitimate opportunity structure of society. Society and the community, of course, would benefit from more and better equipped men and women in its labor force as well as from a decrease in the number of potential recidivists." [12]

To place these objectives in perspective, it is useful to note the nature of Department of Labor's involvement in correctional activities. Within DOL, interest in pre-trial services grew from manpower training policies that were developed in the early sixties to accommodate the training needs of convicted offenders. Formalized under Section 251 of the Manpower Development and Training Act, for the first time, manpower services were extended to prisoners in state and local correctional institutions, a disadvantaged group previously not eligible for assistance within the definitions of unemployed or underemployed persons. [13]

Efforts to better equip this group for work on the outside (largely through prison-based vocational training), led to an expanded policy of intervention at other points in the criminal justice and corrections systems. At

one end of the spectrum, systems to deliver post-release services were developed to support in-prison efforts. And, at the other end, pre-trial services were adopted as a logical preventive step that would provide legitimate sources of opportunity to young people charged with economic crimes. At the same time, the provision for a dismissal of charges in successful cases, would eliminate the conviction record, an acknowledged barrier to the employment prospects of young adults.

In short, a concern for the labor market potential of the accused supported the Department's early commitment to pre-trial intervention efforts – a commitment that developed in a context somewhat independent of the growing concern for bail reform. Certainly, the crowding, and costs of detention and the excessive hardships imposed on some defendants by their inability to raise bail, bolstered the case for intervention at the pre-trial stage. Nevertheless, despite the optimism in project goal statements, it is not clear that the early manpower-based intervention design ever intended to address these issues explicitly.[14] Rather, it was a strategy to gain access to youthful unemployed and employment-handicapped individuals whose status in the labor market might be further jeopardized if criminal prosecution were allowed to proceed.

Three goals, then, emerged as potential evaluation criteria: the delivery of manpower services to enhance the employment potential of selected defendants; the development of a workable procedure to allow these defendants to avoid the stigma of conviction; and ultimately, the reduction of recidivism through the provision of legitimate wage-earning opportunities.[15]

The clients of the early Manhattan and Crossroads projects were unemployed or underemployed young adults with minimal or no prior records, generally charged with property-related misdemeanors.[16] Following the application of project screening and selection procedures, eligible and willing defendants were assigned to a project counselor (often an indigenous community worker or ex-offender advocate) responsible for providing one-to-one counseling and coordinating all other direct and referral services. Consistent with their focus on the accused as a manpower resource, both projects emphasized the development of appropriate employment and vocational training opportunities. Participants who satisfactorily completed a ninety-day

period of deferred prosecution were recommended for a *nol pros* or dismissal of charges pending. These were the project's "favorable" terminations. "Unfavorables" – those who were rearrested, absconded, failed to cooperate or were unwilling to obtain and hold a job – were returned to the court without a recommendation.

The early operations of the Manhattan and Crossroads projects served to demonstrate that the pre-trial intervention concept was feasible: that one could negotiate access to selected defendants for the purpose of delivering services, and that the court or prosecutor would agree to consider case dismissals if those services were accepted by the accused. The willingness of the courts to accept this innovation, thereby assuming an added social responsibility, was considered a major criterion of success. [17]

Regrettably, the pressure of establishing these innovations exacted its price in repeated failures to offer more direct evidence of project performance, specifically the impact of intervention on the recidivism and employment prospects of participating defendants. Although both issues were addressed in the early Crossroads and Manhattan evaluation documents, and both claimed notable success in reducing recidivism and improving the labor market status of participants, these findings have since been recognized as products of logical errors and overenthusiastic reportage. [18]

Briefly, three shortcomings were common to both evaluation attempts:

1. Selection of non-random comparison groups. Both studies based their recidivism findings on a comparison of the performance of participants with that of a retrospective group of non-participating defendants (who proceeded through the court without intervention and were selected through record searches). Since the comparison groups had not, however, met all the participant selection criteria, serious doubts are cast on the validity of any comparisons between the two groups.

2. Comparison of only "good" participants ("favorables" or "successful" terminations) with all members of the comparison group. Such comparisons, which use only a selective portion of the participant group, will inevitably favor the participants since a proper comparison group will contain some proportion of individuals who might have terminated unfavorably had they entered the program. Findings based on these comparisons can

lead to only one conclusion: "After all non-performers and most known recidivists are returned to the courts, the remaining participants look better than a group which still contains its failures."

3. Comparisons of participant status before and after program participation, when the measure for comparison is used as a criterion for participant selection. If, for instance, participants are selected because they are unemployed, they are likely to show improvement, if only because they have nowhere to go but up. Pre-post comparisons of favorable participants only are similarly biased: Since favorables are designated as such because their performance has improved, "after" measures cannot fail to look better than "before."

Despite these errors, the findings of the Manhattan and Crossroads studies received the attention and enthusiasm of a broad audience. They served, however, more to popularize the notion of diversion than to shed any genuine light on the rehabilitative potential of pre-trial intervention services.

The Nine "Second-Round" Projects

In 1971, with the development of nine "second-round" projects, the feasibility of the pre-trial intervention concept was tested in a broader range of local circumstances.[19] With the support of the Department of Labor's Manpower Administration, proposals to replicate the basic Manhattan/Crossroads design were funded in Atlanta, Baltimore, Boston, Cleveland, Minneapolis, San Antonio and three sites in the California Bay Area (Hayward, San Jose and Santa Rosa).[20] Although a number of important process achievements were recorded over the next two years, the implementation of these and other locally-initiated projects also served to confirm some of the practical limitations of the intervention design.

At the outset, program planners in each of the nine second round sites, entered into negotiations with local courts and prosecutors to determine appropriate criteria for diversion. Although all nine sponsors succeeded in introducing the concept, the nature of official response to the program varied, leaving some projects with initial and often continuing restrictions on the types of defendants who might be served.[21] Beginning with the

group of defendants defined by eligibility standards, the intervention process itself clearly placed further conditions on those who would actually be admitted and after admission, those who would actually receive a dismissal of charges.

To locate potentially eligible diversion candidates, a project generally depends either on direct referrals (from the presiding judge or more commonly, the prosecutor) or on its court-based screening staff who perform daily reviews of the docket or similar court papers. Once identified, a typical program candidate must agree to the diversion by waiving the right to a speedy trial and agree to the intervention by indicating some willingness to cooperate with the program. The initial contact may be made in lock-up facilities, in court at arraignment, or, for those released, by appointment at project headquarters.

Given a positive response, the candidate's prior criminal and personal history must then be verified, and in many cases his or her motivation may be tested prior to admission. [22] Finally, the prosecutor, the presiding judge, or both, must concur with the project's decision to divert. Not surprisingly, many projects suffered substantial fall-out between the identification and intake stages. [23] As a result, even those projects with fairly broad eligibility standards might find their services applied to a fairly selective participant group.

At any time after the point of intake, defendants who violate their project's conditions for diversion (generally by absconding, incurring new charges or failing to cooperate with the treatment regime) may be terminated by the project and recycled through the court on their original charge. The prosecutor or court is notified of the termination and the case is returned for prosecution, presumably without prejudice. [24]

Those who satisfy their obligations to the program are recommended for dismissal and with the cooperation of the prosecuting attorney or judge, the case is dismissed. In the absence of full cooperation, even a favorably terminated defendant might proceed from pre-trial intervention services to a short period of post-conviction probation supervision. [25]

Clearly, the entire process is highly sensitive to the motivation of the defendant, the discretion of program staff and the perogatives of the court and prosecutor. Moreover, to establish official confidence in project efforts, pressures abound to divert minimal risk cases and to terminate and thereby be absolved of final responsibility for those who evidence little or no progress. If minimal risk cases enter to begin with, few will probably be terminated. If more chances are taken initially, more are likely to be turned back to the court. [26] Since these cases are then the court's responsibility, a project is left in the enviable position of being accountable only for its successes. In the event that unfavorable termination rates become excessive, they are easily corrected by exerting greater control over intake.

In the final analysis, a major question surfaces from the experiences of the manpower projects: Have they simply been asking too much by combining an interest in intensive service delivery with a provision for dismissal of charges? Can they ever be expected to gain access to those who might be considered a greater threat to the community (and thereby most in need of intervention services), when diversion itself implies nonprosecution of minimal risks? The experience recorded thus far in the evaluation literature suggests that the combination may well be an impractical one. Although there are examples of aggressive selection policies apparently succeeding in their mission to divert the higher risk defendant, [27] the fact that a majority of the nine replications could not, suggests that the concept in practice is highly susceptible to dilution.

Unquestionably, many of the documents reviewed are dated and do not properly reflect the gradual expansion of admission standards that began and probably continues to occur as projects gain the confidence and support of criminal justice officials. Yet, even if programs can succeed in treating higher risk defendants, it remains to be determined whether or not a diversion mechanism (which allows a program to return its failures to the court) is the best manner of dealing with the need for pre-trial supervision in these cases. If higher risk diversion should result in higher in-project failure rates, the personal liabilities of the unfavorably terminated group, and the costs associated with the aborted diversion attempts, may outweigh the benefits that accrue in successful cases.

Clearly, judgements in this area require some knowledge of the net effects of intervention and diversion policies on all participating defendants. Unfortunately, apart from documenting the selection and servicing trends that emerged with the development of nine new projects, the evaluation of the second round projects (the "DOL study") was only marginally more successful than its predecessors in shedding light on the question of whether in fact pre-trial intervention services reduce recidivism or otherwise affect the lives of participants. Plans for controlled comparisons between participating and non-participating defendants in each site broke down under the apathy, resistance and ethical objections of projects to quantitative evaluation procedures.

In only one site (Operation de Novo in Minneapolis) were diversion program staff willing and able to construct a comparison group sufficiently complete to permit an assessment of the difference in rearrest rates between participating and non-participating defendants. There were, however, two potential sources of bias in the comparison group data provided:

1) Some members of the comparison group were subject to the same selection bias of the Manhattan and Crossroads groups. Selected retrospectively from probation case files, they failed to meet some participant admission criteria.

2) A disproportionate number of the comparison group rearrests occurred on charges classed as public order offenses (breach of peace) and traffic violations (driving after license revocation), suggesting a potentially biasing but inexplicable reporting problem.

Excluding the comparison cases derived from probation case files and all public order and traffic allegations against both groups, the reported rate of rearrest among participants was less than that of the comparison group in the short-term. [28] Nevertheless, given the possible non-representative nature of the sample and the apparent reporting problems, it is difficult to attach a great deal of confidence to this finding. Moreover, the restriction to a single site inhibits any generalization to other diversion efforts.

Using all participant records in all sites, the study also attempted to docu-

ment the differential effects of program services on different classes of participants. In this analysis, manpower services, although associated with comparatively low recidivism for those with long-term unemployment problems, had essentially no impact on those who had been employed recently before arrest. Counseling services, on the other hand, were related to low recidivism among those with stable employment backgrounds but not for those with unemployment problems. Needless to say, although these findings provide some insights into the efficacy of a manpower approach, in the absence of controlled experimentation, they do not address the question of its relative effectiveness as an alternative correctional strategy.

Program Variations

Employment-focused programs such as Crossroads, Manhattan, and the nine second-round projects represent only one approach to pre-trial intervention. In fact, the findings noted above concerning the relative efficacy of manpower vs. counseling services suggest that personal counseling alone may be of value to those who may not require specific employment assistance. Moreover, legal observers have argued that limiting the delivery of pre-trial services to defendants unemployed or underemployed may be subject to challenge under the equal protection safeguards of the Constitution. [29] Consequently, even the original manpower focused programs have often relaxed this criterion and have accepted fully employed candidates as well as students.

Dade County

Although many other projects have incorporated elements of the manpower services model, not all evolved under the same employment mandate, or as agencies administratively independent from official components of the justice system. In early 1972, a project in Dade County was initiated by the State Attorney's Office. Although it was subsequently placed under the office of the Court Administrator, the project continues to receive funds and office space from the State Attorney.[30]

Project efforts have focused on personal counseling with substantially less emphasis on manpower development services or referrals to related

community resources. Overall, this project's choice of a less comprehensive service strategy, a choice presumably dictated by the needs of its participant group, seems to reflect a more visible concern for the diversionary aims of such a project. In turn, the stronger emphasis on diversion is probably consistent with the project's prosecutorial affiliation. Whether that affiliation adds to the coercive nature of the diversion offer is a speculation not formally investigated by the project's evaluators. The profile of participants admitted does, however, suggest that it may result in a more explicit policy of diverting and treating cases which ordinarily might receive minimal official attention. At the time of the evaluation report (mid-1973) a substantial number of participating defendants were charged with soft drug related offenses (possession of marijuana) and eligibility criteria restricted admission to those with no prior convictions.

Although the Dade project represents a departure from the intensive coordinated service approach of the manpower projects, it has been nonetheless motivated by the desire to promote the defendant's economic and social stability, thereby inhibiting future criminal incidents. Accordingly, evaluation efforts have attempted to document counseling effectiveness, reduction in recidivism and improvements in participants' employment or educational status. For substantially the same reasons noted earlier in connection with the Crossroads and Manhattan evaluations, these efforts have yet to produce conclusive results. In the analysis of recidivism, an additional difficulty resulted through the use of different periods of observation for participant and comparison group members -- the participant group was exposed to rearrest about half as long as the comparison group. [31] The findings reported regarding the effects of the project's counseling component are similarly difficult to interpret, although the attempted measurement of psychological impact on participants may be an important step toward a more thorough evaluation of the consequences of diversion.

Citizens Probation Authority

Another and perhaps the earliest example of a prosecutor-based diversion project is the Genessee County Citizens Probation Authority (CPA) that began in 1965 as a Court of No Record under the Prosecuting Attorney's

Office. Three years later, to permit expanded caseloads and to enhance the status of the program as an "extra-legal" device, CPA was established as a formal voluntary pre-prosecution probation program separate from the prosecutor's office.[32]

Apparently, CPA has approached diversion from a fairly devout screening perspective. By formally articulating this policy (practiced elsewhere but seldom acknowledged) it is one of the few projects to recognize -- albeit not resolve -- the dilemma drawn between diversion and treatment objectives. As a practical matter, the goal of deterring future criminal behavior is explicitly disavowed. Rather, the primary interest lies in screening out the "criminally disposed" and "screening in those whose offenses appear to be of a situational, temporary or impulsive nature." A CPA evaluation document maintains, " (1) that CPA is not designed nor intended to modify criminal behavior, and (2) that a legitimate and major need exists to process and treat persons who are 'lawbreakers' but not 'criminals'. . . . "[33] Thus, in the absence of rehabilitation goals, the project theoretically functions to relieve court congestion and alleviate the burden of criminal processing for the accused. Surprisingly, although its stated intent is to divert cases not likely to recidivate, a structured program of services is available to support the decision not to prosecute. At a minimum, service delivery in CPA generally consists of monthly counseling sessions throughout a one-year pre-probation period. CPA describes its selection and treatment policies as follows:

> ". . . Citizens Probation Authority uses very strict screening controls resulting in the selection of only the most rehabilitatable among the offenders [sic] for inclusion in its program. . . [CPA] interviews the offender, advises him fully of his constitutional rights, describes the program to him and asks for permission to conduct a confidential background investigation . . . Upon completion of this personal and social history investigation, a 'treatment plan' is recommended to the prosecutor. If the prosecutor believes this is to be a realistic plan . . . and the offender has agreed to abide by the conditions of the treatment plan for a period of one year, then the prosecutor consents to defer further prosecution pending the offender's successful completion of the probation period.

> For failure to complete any of the conditions of his probation agreement, the case may be returned to the prosecutor's office and a warrant requested. Upon successful completion of the program, further prosecution is dismissed and the police records are expunged."[34]

The CPA evaluation reports a low rate of recidivism to support the success of its selection policy. It does not claim, and correctly so, that the low rate is an indication that participant behavior has changed. Rather, the data are offered simply to show that the project has succeeded in selecting defendants who don't recidivate much. Given this selection policy, the rationale for providing a year long period of service is somewhat obscure. It is one thing to disclaim any ambitions to modify criminal behavior thereby justifying the selection and non-prosecution of minimal risk cases. This occurs quite routinely as a function of the prosecutor's discretionary case screening decisions. It is quite another to supplement that decision with a fairly long period of pre-trial supervision and services without some assurance that the treatment is being applied with some expectation for change.

Forgetting for a moment that the impact of the project's supervision and services must be relegated to the unknown, it is equally difficult to determine whether the diversion policy itself has resulted in "preventing the stigma of arrest and conviction and the notoriety and shame which often accompanies criminal prosecution." [35]

Four questions are central to any judgements in this area. Although these questions are defined by the objectives described for CPA, they are equally applicable to most intervention efforts.

– First, to properly answer the question whether diversion has reduced the implications of normal criminal processing, we need to know what those implications are. What would have been the consequences of criminal prosecution had diversion not occurred? It is certainly not unreasonable to assume that participants who have been identified as sufficiently low risk for diversion might have been classed as low priority for prosecution and hence not convicted.[36]

– Second, assuming participants would have been convicted and subjected to at least a one year probationary period under normal circumstances, is it clear that providing that supervision before adjudication of guilt is any less stigmatizing than the normal criminal process? With the repeated references to "offenders" who participate in CPA, it is not clear that criminal labelling is entirely avoided by practitioners of diversion programs themselves. Commenting on this issue, Freed has characterized pre-prosecution probation as an extension of prosecutorial discretion into a new arena of pre-trial sentencing. [37]

– Third, assuming non-official intervention avoids the labelling problem and an otherwise assured conviction, can projects in fact follow through on their promise of expunging arrest records? (The CPA evaluation report indicates that this was a troublesome area often subject to "mechanical breakdown.")

– Finally, assuming all is well for those who satisfy their obligations to the program, is it certain that those returned for prosecution on their original charge are not stigmatized by program failure, a stigma that may have personal implications as well as implications for the outcome of their case?

By virtue of their diversionary features, all programs have incorporated the goal of reducing the stigma of criminal prosecution. None of these questions, however, have been adequately addressed in the evaluation literature.

Operation Midway

Thus far, we have viewed two ends of the spectrum of pre-trial intervention opportunities:

– "Manpower-based" intervention projects which have generally functioned as independent agencies often using their own court screeners to identify cases which are then approved as a discretionary function of the prosecutor or court. Intensive manpower-related services are provided within limited caseloads.

– Diversion-oriented "counseling" projects which, although administratively separate from the prosecutor's office, are under direct prosecutorial control, depending on that office for all referral and termination decisions. Caseloads are higher and service delivery less varied and intense.

A third and distinct variation is provided by Operation Midway in Nassau County, New York. [38] Midway was established within the Nassau County Probation Department in 1971. Participants, almost exclusively felony defendants, are referred to the program after indictment at the discretion of the judge sitting at arraignment. According to the project report, application must be made by counsel and the final acceptance decision rests with Midway's probation officers.

Defendants agree to deferred prosecution and pre-trial probation supervision for a period of not more than one year. The services provided by the probation officers (who maintain limited caseloads) include testing, individual and group counseling sessions and related social service assistance.

Midway's functional and administrative alliance with probation has resulted in two significant departures from common diversion practice:

1) Rather than using non-traditional staff in counseling roles, Midway's "counselor-advocates" are Probation Officers. (Reportedly, however, project activities are easily distinguished from those of probation: Officers who serve those under indictment do not also serve convicted offenders and participants have apparently identified with Operation Midway rather than the Probation Department.) [39]

2) At the point of termination, in addition to a recommendation for outright dismissal, plea bargaining may be considered "in those cases where the alleged criminal act was of such severity that the District Attorney's Office would not consider dismissal." [40] This is stated in the formal conditions of the grant as follows:

> "Upon completion of the program, the defendant's case shall be processed to completion in the normal manner, except that the Director of the Program may, in appropriate instances:

a. recommend to the court that individual cases be dismissed with consent of the District Attorney, or

b. report to the County Court upon the defendant 's activities during the program as a part of the pre-sentence investigation to be considered by the court in sentencing." [41]

In using the investigative perogatives of its parent agency to facilitate plea-bargaining, Midway has apparently extended the traditional pre-sentence reporting role of probation into the pre-conviction stage of proceedings. Although it is not clear precisely how the issue of confidentiality is treated by Midway, the transmission of pre-sentence information to the prosecutor or court prior to a plea or determination of guilt may serve to further obscure the easily forgotten fact that pre-trial intervention clients are accused – not convicted -- persons.[42]

Notably, Midway has secured the active involvement of defense counsel in its diversion proceedings. With few exceptions, diversion clients in most projects do not routinely have the opportunity to consult with a defense attorney at either the referral or termination stage.[43] According to the Midway report, defense counsel are actively involved in the referral process, attend in-project conferences regarding the client's progress, are involved with program discharges and dispositions, and are generally considered a valuable source of motivation for the client. It is not clear, however, whether this policy would be easily replicated in other diversion programs. Midway's focus on accused felons and its role as a pre-conviction rather than pre-trial service program may provide a unique impetus for the collaboration of defense attorneys. And, consistent with Nassau County's position as a relatively wealthy community, many attorneys who have formed an alliance with the program are apparently retained by their diversion clients. [44]

Like the Dade County evaluation materials, Midway's early evaluation report necessarily covers only a small number of participants over a limited time period (2/71 - 11/71) and concentrates on reporting measurements of attitudinal change (using a client self-concept scale and a scale of discrepancy between actual and ideal self concepts). Since the psychometric scales used are not part of the standard literature, it is difficult to assess the extent to which they actually measure self-concept and discrepancy.

As an incidental measure, a low level of participant rearrest is reported as evidence of project success. However, only five participants had completed their tenure in the program at the time of the evaluation document.[45] Moreover, since data were not collected for a reference group, no statement of recidivism effect is possible. In fact, if the currently low rate of rearrest is maintained as more participants are exposed for longer periods of time, we can only assume that Midway participants – although more severely charged – are only circumstantially higher risks. Without a comparison with similar defendants processed in the normal manner, Midway, like CPA, can only assert that it has selected participants not likely to recidivate.

SUMMARY OF EVALUATION AND POLICY ISSUES

It is clear that the pre-trial intervention concept poses a fundamental dilemma acutely reflected in the evaluation literature. The basic conflict is between the delivery of services to reduce recidivism (presumably among those with enough likelihood of recidivism to make such reduction meaningful) and the provision of a humane alternative for those not likely to recidivate. In practice, the former may become unintentionally or quite purposefully subordinate to the latter as defendants must pass a number of screening tests prior to admission: In most cases, the logic of such screening is either implicitly or explicitly the selection of minimum risk defendants.

As these two goals have become confused, so too have the outcome measures selected as evaluation criteria. As a result, many programs echo the claim that if the absolute level of rearrest among participants is low, it can be attributed to the treatment delivered by the project. Only CPA admits that the only certain conclusion to be drawn from a low rate of rearrest is that the project has selected a group not likely to recidivate.

Because programs do not assume ultimate responsibility for their failures, the confusion often continues. Since those who are returned for prosecution after failing in the program, initially passed all the requisite screening tests, they may be mistaken for a comparison group.[46] Another version of the same grevious logical flaw is the construction of an independent comparison group whose outcomes are then compared with only those who successfully completed the program. Before and after comparisons among successful participants and the omission of unfavorables in post-termination data collection efforts are still other manifestations of the tendency to forget that a program starts out with a responsibility to *all* its participants.

The same logical fallacies that impede meaningful evaluation efforts have raised serious questions regarding the ability of the pre-trial intervention design to function as a less costly or more humane alternative to traditional criminal proceedings.

– Is the notion of maintaining low risk defendants in a pre-trial holding pattern for 3 months to one year consistent with the objectives of diversion? Many observers fear that in responding to the "crisis of overcriminalization" diversion programs have simply created a parallel structure that maintains and extends official control over the accused. Often discussed in relation to delinquency prevention efforts, it is a danger equally applicable to the practice of diverting and treating adult criminal defendants who may not have extensive supervisory requirements.

> "Not all deviant behavior requires treatment, whether in or out of the criminal justice system, yet the mere presence of a functioning mechanism of community services, with none of the more obvious drawbacks of the penal system, is likely to result in the "treatment" of many more individuals by official agencies." [47]

The diversion of small numbers of low-risk defendants further obscures a realistic assessment of the probable cost savings of the deferred prosecution approach. The nine second round manpower programs have observed limited caseloads (approximately 25 cases per counselor) and have maintained a fairly costly service apparatus resulting in per capita costs of $651 to $1,388 during the first two years of operation. Programs with higher caseloads or less intensive service capabilities have ranged from $65 to $515 per case. When these figures are adjusted for the additional costs incurred by the court in processing unsuccessful cases, most programs emerge as fairly expensive alternatives.[48] If they were truly functioning as alternatives to incarceration, justifying the expense would not be difficult. The evidence available indicates, however, that in the absence of a diversion alternative, few project participants would have faced a jail sentence.[49]

To the extent that participating defendants would have been convicted and placed on probation, the workload of the probation agency is

clearly reduced. The real savings, however, are somewhat ephemeral. A 10% reduction of cases calendared or probated does not necessarily result in the dismissal of one out of every ten judges; clerks, bailiffs, etc. Moreover, although participants are off probation caseloads, they are still on somebody's caseload, in this case, a new agency created to sustain them during the pre-trial period.

– A related and somewhat controversial issue in the administration of deferred prosecution programs is the implicit presumption of guilt that accompanies the diversion procedure. [50] In fact, where diversion has been directly sanctioned by the prosecutor, there may be little distinction between an explicit and implicit presumption of guilt. CPA, for instance, requires the defendant to acknowledge "moral responsibility for his unlawful acts." [51] In Honolulu, a Deferred Acceptance of a Guilty Plea (DAGP) Program was added to the City's Deferred Prosecution Program in response to difficulties experienced by the prosecution in commencing action against cases unsuccessfully deferred. [52] Under this procedure the defendant signed a written admission of guilt. The ABA has indicated that a guilty plea should not be imposed as a condition for diversion [53] and in fact the overwhelming majority of programs do not require this admission. Nevertheless, in practice, by intervening to provide remedial services, it is practically impossible for diversion programs to avoid attaching the implication of guilt to their accused (but unconvicted) participants.

Although alleviating the consequences of criminal prosecution is a prime concern of deferred prosecution programs, the presumption of guilt may easily negate any mechanical efforts to avoid stigmatization. All programs have sought to avoid a conviction record (which may or may not have been guaranteed in the absence of diversion). However, since the record of arrest often remains, this may be of somewhat limited value. CPA promises to expunge arrest records, a promise apparently somewhat difficult to fulfill. In Dade County, official arrest records contain the notation "Referred to PTI." However, the primary advantage of "Referred to PTI" as opposed to "suspended sentence" may be that the meaning of the former is not yet well defined. Presumably, as soon as users of records come to understand PTI, it will become part of the traditional criminal justice system and lose its value as a way of avoiding a

record. Finally, while the consequences of presumed guilt are probably not worrisome for any participant who enters a program with a prior arrest or conviction record, the value of avoiding any record of the current charge is probably similarly diminished.

– The third critical issue returns us once again to the fate of those who fail to meet program requirements and are terminated with no recommendation. As we have seen, these cases are subject to a kind of informal double jeopardy. They are placed on pre-trial "probation," they fail, and are returned for prosecution on their original charge. That this group may be prosecuted more vigorously as a result is an easily imagined -- albeit not formally substantiated -- risk. Nevertheless, the end result for most "unfavorables" is conviction followed by another period of probation supervision. [54]

In the absence of well-defined termination guidelines, the discretion of program staff will inevitably play a significant role in determining termination status. Rearrest and abscondance are frequently the only clearly defined criteria. A participant's responsiveness to the service delivered (obtaining and holding a job or attending project counseling sessions), are the "softer" measures often considered in the termination decision. To the extent that such services are motivated by a project's allegiance to sectors other than defendants (e.g. the labor market) such treatment may be of questionable benefit from the client's point of view. This is particularly striking in programs delivering job placement services where it appears that employers may be better served by the placement than are clients. [55] Moreover, although all programs seem to have attracted highly responsible, dedicated staff for their counseling positions, there is a distinct possibility that the pressures involved in some counseling maneuvers are simply not palatable to some clients. [56]

In characterizing this problem, Phillip Ginsberg, Chief Public Defender of Seattle-King County, has questioned the wisdom of providing "well-intentioned social engineers" with the discretionary authority to affect the legal status of accused persons:

> ". . . how quickly will they blow the whistle? How much flexibility will they have to say this particular program did

not work out, not because the defendant was wrong, but because the program wasn't right . . ."[57]

In short, given the element of "constructive coercion" that may propel the accused into a diversion alternative, the distinction between rehabilitative and punitive treatment may be only a matter of semantics. To expose as many as one quarter of all participants to double jeopardy (in the first instance, solely on the basis of unproven allegation), seems an unfortunate feature of a well-intentioned design.

Over all sites reviewed in the DOL second round evaluation, in 48% of the unfavorable cases, lack of cooperation constituted the major reason for failure to receive a dismissal recommendation. Furthermore, on the basis of data obtained in one site, the DOL study suggests that in the long term unfavorables may present no greater threat to the community than their favorable counterparts. [58] These findings raise serious questions regarding the mechanics of the intervention process.

In community manpower or social service programs, no sanctions are placed on program drop-outs or failures. By their own choice, or at the discretion of program staff, they may leave under no penalty worse than a foregone opportunity. The same program, operating in the court arena and accepting diversion cases, is forced to play with higher stakes. Any termination decision will affect the legal status of its participants. An unfavorable decision – specifically one based on a judgement of non-cooperation – may well be asking the courts to add social performance criteria to definitions of criminal conduct. Few could avoid sympathy for the situation of a hypothetical defendant charged with petty larceny and chronic non-attendance at counseling sessions.

ALTERNATIVE REFORMS

Admittedly, the risks associated with diversion may quickly pale in contrast to the limitations and inequities clearly visible in viewing the traditional administration of criminal justice. Yet it is precisely due to those difficulties that diversion schemes evolved. Ironically, in attempting to circumvent these basic system deficiencies, a new system with its own attractions and deficiencies has begun to mature without furnishing convincing evidence that it has seriously affected the basic problems that attend the pre-trial criminal process. In discussing the impact of early bail alternatives, Patricia Wald has simply stated the limits of single reform efforts:

> ". . . The dilemma of bail reform in the sixties raises fundamental questions about whether any part of the criminal justice system can be significantly improved until all of it is."[59]

Here it may be instructive to enumerate some of the more fundamental reforms that have been suggested to meet the varied expectations currently placed on pre-trial diversion efforts.

1. Implementation of procedures to ensure speedy trials.
Diversion has been viewed as an opportunity to productively utilize the inevitable delays that occur between arrest and adjudication. The assumption is that early intervention provides an immediate stimulus for the defendant's cooperation with a rehabilitation effort. CPA provides a straightforward appraisal of this benefit.

> ". . . the offender begins to receive counseling and assistance with his problems almost immediately after the commission of the offense rather than the delay of four to six to eight

months which often occurs between arrest and final sentencing. There is a distinct advantage to being able to deal with the offender at the moment when the magnitude of his offense as an anti-social act is still uppermost in his mind and before he's had an opportunity to spend months making excuses for himself or learning from jailhouse lawyers how to beat the rap or not get caught the next time." [60]

Greater efforts to attack the delay problem directly by accelerating the disposition of these cases, might afford the same opportunity for early intervention at the post-conviction stage. Alternatively, limitations on pre-trial delays in conjunction with supervised release options have been proposed under pending Federal Speedy Trial legislation. [61] (In contrast to the provisions of this legislation, diversion candidates must waive the right to a speedy trial to accommodate periods of deferred prosecution ranging from three months to one year or more.)

2. Improved methods to expunge arrest and conviction records.
To alleviate the possibly negative effects of participation in a pre-trial intervention alternative the American Bar Association's National Pre-trial Intervention Service Center has recommended that projects ". . . join with other segments of the law reform community in eliminating the use of arrest records in determining employment, licensing, loan or educational qualifications." [62] In a statement prepared for the House Judiciary Committee, Daniel Freed has suggested that these reforms may be sufficient in themselves to achieve one of the intentions of diversion.

"Statutes or proposals to permit erasure of arrest records have become fairly common in recent years; those dealing with expungement of conviction records are rare. Yet since both types have precedents and are feasible, there may be nothing magic in the utilization of pre-trial diversion as opposed to post-conviction probation." [63]

3. Criminal code reform.
Many diversion clients may be routed to a pre-trial service program simply because their behavior has fallen, perhaps inappropriately, within the sanction of the criminal law. Decriminalization through the repeal of existing laws has been advocated for a variety of minor misdemeanors and "victimless" crimes. Through revision of criminal codes, some diver-

sion from the criminal process can clearly be accomplished without the need for providing intervention services at all. Among the charges handled by some diversion programs, minor drug-related offenses (possession of small quantities of marijuana) and selected disorderly conduct charges represent two categories commonly discussed in relation to statutory diversion efforts that would require neither criminal nor social service sanctions.[64]

4. Development of early diversion options.
While decriminalization without attendant service obligations is perhaps the purest form of diversion, there exists a range of behavior -- not uniformly amenable to removal from criminal statutes -- that need not necessarily arrive at the court intake stage. The DOL study has hypothesized that many defendants, suffering from minor offense allegations and minimal service needs, were routed to the program simply for lack of any other (earlier) non-official options.

> "Within the nine projects studied, the pre-trial intervention alternative was often used by the system as a convenience for handling a range of minor misdemeanors not necessarily appropriate for full criminal disposition. In these cases, diversion in lieu of arrest may result in far greater savings to the criminal justice system than are currently possible under a strategy confined to pre-trial intervention (which involves the arrest procedure, calendaring cases, and often, two court appearances – an equivalent if not more extensive involvement with the system than might ordinarily occur)."[65]

Similarly, an evaluation of the New Haven Pre-Trial Diversion Program suggests that "the possibility should be explored for moving some release or diversion (including nonarrest) decisions back to an earlier stage in the criminal process, so as to effect savings in time, money and manpower."[66]

Pre-arrest diversion, then, is quite simply non-arrest. "Every attempt is made to handle the minor offender in alternate ways before an arrest is made."[67] Whether the procedure involves the use of police-community affairs officers,[68] citizen dispute mediators,[69] or voluntary restitution

agreements, "the difference is an invitation to virtue rather than coercion to virtue." [70]

5. *Experimentation with broader non-diversionary release strategies and community oriented sentencing alternatives.*

From a release standpoint, Own Recognizance (OR) and diversion programs have often competed for the same clientele. OR has sought to secure the simple pre-trial release of low risk indigents; diversion may deliberately or inadvertently acquire those same low-risks and attempt to accommodate their release and non-prosecution or rehabilitation. This overlap clearly minimizes the opportunity to systematically identify and deal with defendants more likely to remain in pre-trial detention cells and face further post-trial incarceration.

As the evaluators of New Haven's Pre-trial Diversion program have concluded, the proliferation of independent and often duplicative pre-trial services and functions also "poses a substantial challenge to effective criminal justice administration." [71] A subsequent article in the Yale Law Journal suggests that New Haven consider the total consolidation of release options (including detention) under a single leadership. [72] By the logic of the authors, the creation of a single agency to deal with all unconvicted defendants – whether released or detained – would permit more coherent pre-trial status decision-making and facilitate the expanded use of non-detention alternatives.

A project in Des Moines, Iowa, while not as ambitious a reform as that envisioned in the New Haven proposal, has successfully integrated the pre-trial services available in its sixteen-county Fifth Judicial District under the leadership of a Department of Court Services. A specific project objective was to reduce the pre-trial detention population by offering a "community corrections" alternative to defendants who could not otherwise secure their pre-trial release. [73] By entering a "performance contract" to appear at stated intervals at project counseling and information meetings, these defendants avoided detention. An evaluation of three years of this project's activities found that its clients were just as likely to appear in court as those who met OR standards and were released without services. [74]

The Community Corrections Unit is a "diversionary" alternative in two respects: 1) it is clearly diverting defendants from pre-trial detention; and 2) although it does not employ a dismissal of charge provision, based on participating defendants' pre-trial performance the Community Corrections Unit may recommend a course of action to the court, usually probation with suspended sentence.[75]

In addition to conventional pre-trial release and release with supportive services, the Polk County Department of Court Services coordinates these functions with a local Probation Unit and a residential work and educational release alternative to county jail for convicted felons. These units address the need to provide the convicted offender with non-institutional rehabilitation services and may reduce pressures for extensive intervention prior to a finding of guilt.

6. More effective assistance of defense counsel.

In recent years defender agencies have been called upon to take a vital interest in the provision of supportive non-legal resources to indigent clients. Although most defender agencies have not become extensively involved with social assistance efforts, precedents for the association of pre-trial services with the defense do exist and can be considered essential to adequate performance of the defense function.[76] In the District of Columbia, the Offender Rehabilitation Division (ORD) of the D.C. Defender Service was instituted in 1967 as a service for defense attorneys, "to achieve diversion from the criminal process for marginal offenders, probation or other community treatment for those convicted, and more rehabilitation oriented sentences for those incarcerated."[77] The project is staffed by non-legal support personnel and offers attorneys assigned to defend indigent criminal defendants, social reports for use in negotiating disposition and sentence, and assistance in securing community-based social and rehabilitative services.

Although the ORD evaluation report cannot offer firm evidence that this program assisted in reducing the recidivism of project clients, its more modest goals were apparently more than adequately met. The availability of rehabilitative planning services within the defender agency enabled attorneys to negotiate the pre-trial release of indigent defendants and to prepare clients for less restrictive sentences than they might ordinarily expect.[78]

Whether or not a pre-trial service agency is actually administered by a defender agency,[79] an adequately funded and properly functioning defense system can clearly use its advocacy position to accomplish many of the outcomes commonly associated with formal diversion programs. Most important, it can do so within the existing system without the selectivity necessarily imposed by single purpose diversion efforts.

7. Expanded probation resources.

Proponents of diversion often cite the high caseload/minimal service dilemma of most probation agencies as a justification for the development of intensive pre-trial service alternatives. Again, addressing the problem by developing a new organizational alternative may not be the most direct solution possible. In fact, the generous resources many diversion programs have enjoyed might play an important part in upgrading the ability of probation to function as a viable sentencing alternative.

> ". . . since the useful and well-funded services provided by pre-trial diversion programs typically exceed those being offered by post-conviction probation programs in the same jurisdictions, what evidence is there in the record to suggest that an equally low rate of recidivism for the same defendants could not be achieved if probation programs were equally funded and offered the very same services." [80]

Operation Midway, a diversion program administered as a separate arm of a probation agency, provides the most direct example of the robbing-Peter-to-pay-Paul phenomenon.

> ". . . To be perfectly candid, I must confess that when Operation Midway is compared to traditional probation agencies, there are certain conditions that one must take into account which obviously favor Midway. Throughout most of this project year, four well-trained probation officers have been working under the direction of a carefully selected project director who has doubled as case supervisor. The caseloads were usually small in comparison with most probation agencies. A tremendous investment was made in terms of

time, facilities and use of personnel. . . "[81]

Although the trade-offs are clear, unfortunately, neither Midway nor any similar program has yet demonstrated exactly what the pay-offs of that investment are.

FUTURE RESEARCH NEEDS

As alternatives to pre-trial intervention as it is currently practiced, each of the reforms outlined in the previous section make one or both of the following assumptions:

- that pre-trial services may be more equitably delivered if projects do not incorporate uniform provisions for non-prosecution;

- that with more basic reforms to the criminal justice process, many of the advantages of diversion might be equally available through a post-conviction service program thereby eliminating the dangers that inhere in manipulating the status of accused persons.

One crucial piece of information is necessary before we can assume that either non-diversionary pre-trial services or post-conviction services might carry all the potential benefits commonly attributed to pre-trial intervention services. Although the same services might be provided by the same community-oriented non-professional staff and convicted persons might still avoid a record (through expungement), the deferred prosecution element is missing.

A reasonable and as yet unsupported hypothesis of diversion is that cooperation while in the program -- specifically, avoidance of new offense allegations and receptivity to rehabilitation services -- is positively related to the incentive offered by the opportunity to avoid prosecution. According to Franklin Zimring, "early diversion is best viewed as a multi-goal process offering two scarce commodities -- non-prosecution and expensive, albeit coerced, treatment services . . ." [82] Determining the

impacts of one commodity independent of the other is a crucial measurement not yet reported in the evaluation literature.

At best, research efforts to date have indicated that if participation in a diversion alternative has an effect on recidivism, it is probably of limited duration and generally small magnitude. [83] Moreover, if such an effect exists, we cannot determine exactly why it resulted. If it is the treatment that produces the impact, immediate disposition followed by post-conviction services might do the job equally well. If it is largely due to the opportunity to avoid prosecution, a diversion policy might be desirable and in many cases probably need not be accompanied by extensive rehabilitation services.

Only one diversion project reviewed offers no supervision or services during the pre-trial period. The Deferred Prosecution Program in Honolulu is limited to accused persons charged with first or situational offenses. These defendants do not enter a rehabilitation program; In addition to the dubious requirement that participants sign a formal admission of guilt, the only condition attached to non-prosecution is that of remaining conviction-free during a one year to 18-month period of deferment. The program reports a 6.4% rate of subsequent rearrests and convictions for a group of deferred cases (157) over a two-year period.[84] This falls clearly within the range of rates reported by service oriented programs which have accepted similarly low-risk defendant groups.

Although the experience in Honolulu is somewhat intriguing, strict inferences regarding the impact of deferment or deferment vs. services, are not justified. Clearly, however, both questions need to be answered. To do so, at least two comparisons are necessary – comparisons that can only be made through the use of randomized control groups composed of subjects eligible in all respects for program participation. The first would compare the performance of defendants diverted and treated with the performance of a comparable group who were simply diverted. The second would compare the same non-officially treated diversion cases with cases processed in the normal manner. A proposal to conduct this experiment within the Manhattan Court Employment Project has been submitted by the Vera Institute of Justice to the Law Enforcement Assistance Administration. If this study can be successfully implemented

it will stand alone as the first valid endeavor to answer the questions central to any judgements on whether pre-trial diversion works and if so, what makes it work.

The Vera Institute has consistently pioneered in the development, implementation and evaluation of criminal justice reform projects. Regrettably, in emulating the experiences of Vera, other communities have tended to stop short at the implementation stage, neither establishing experiments of their own nor conducting objective program evaluation. Following Vera's initial bail reform work over ten years passed without significant further experimentation in other communities. By 1976 the new Vera study of diversion may have produced findings significant to the continued development of diversion policies in Manhattan. Hopefully, similar experimental efforts will be initiated in other communities long before Vera's results are available. There will then be a collection of comparable research works upon which to base broader judgements regarding the impacts of alternative pre-trial service policies.

Research Implementation Problems

Although the Vera design is straightforward in concept, in the past, objections to control group selection have prohibited the implementation of similar experiments. In referring to the first Manhattan evaluation, Zimring notes two reasons related by the project directors "for the failure to institute a random assignment experiment at the outset of the project's operations."

> "First, 'the experimental nature of the Project demanded emphasis on effective day-to-day operations.' This reason – the press of circumstances – is a general plea in mitigation and need not detain us long . . . . The second reason was a belief that 'denying participation for the purposes of research violated the humanitarian tenets of the Project and the sensitivities of the staff.' " [85]

Similarly, the Crossroads evaluation did not incorporate a random selection process. Although the evaluation does not indicate that such a procedure was considered, the late introduction of a research component

to the Project apparently forced the use of historical case files to construct the comparison group. (A one-year period was allowed for all design, data collection, analysis and write-up which would have drastically cut efforts to follow-up on any concurrently selected comparison cases.)

Finally, the nine second round projects, each responsible to the same outside evaluator, were asked to select and follow control samples. This procedure was not implemented as "project staff felt that any denial of service to eligible defendants would contradict their basic service goals and would not likely receive the necessary endorsement of judicial administrators." [86] Efforts to use the expected overflow of eligible defendants also were not successful. Because of projects' extreme selectivity, an overflow did not materialize in most sites. Even attempts to construct groups from closed case files failed in eight of the nine sites due to the "amount of time required, the inherent difficulty of the task, and often, the perceived lack of justification for developing information on individuals not served by the program." [87]

In sum, comparative data has either been unavailable or has been constructed from the records of defendants selected by retrospective "matching" procedures. [88] Defendants who appear -- on paper -- to roughly match the characteristics of eligible participants, have been selected retrospectively from closed case files. Since entrance criteria require that participants pass more than a "paper" screening, the validity of these groups can always be attacked.

In only one of the studies reviewed was a nearly satisfactory retrospective comparison group selection procedure used. In a reanalysis of the Manhattan Court Employment project, Zimring compared a sample of defendants who had passed the project's first screening (only some of whom were treated), with a group of defendants who were arraigned on weekends during the same months and hence not admitted to the project. In none of Zimring's comparisons did members of the weekday group show a significantly lower rate of recidivism. Because treatment had been applied to only a small part of the weekday group its effect was, of course, proportionately diluted, severely limiting the precision of measurement. Nevertheless, this method offers the only internally valid substitute for random assignment presented in the literature reviewed.

In summarizing the results of his analysis, Zimring has offered several arguments to counter the substantive objections to a pure random assignment procedure.

> "First, there is currently a group of defendants who are not eligible for project participation, but who are no less deserving of consideration than any possible control group, that is, defendants arraigned on weekends. Whether this exclusion is a matter of convenience or a conservation of scarce resources cannot be determined, but since the number of defendants diverted and treated would not be affected by an experiment, the problems of denying services to controls are no greater than denying eligibility on weekends, and the benefits of the policy of random assignment are much greater."
>
> "Second, the defendants placed in the control group would not be subject to heavy criminal sanctions. Less than one-fifth of the defendants who would have passed the Project's write-up screening are detained before trial . . . . Further, the punishments received by people eligible for diversion are far from awesome . . . . "
>
> Finally, ". . . in Manhattan half of the defendants offered project participation refuse. Withholding the offer might work some hardship on willing controls, but when the value of the Project is deemed so marginal by its potential clientele, the humanitarian objections to experimental controls are as close to *de minimis* as are likely to be found in criminal justice reforms." [89]

Similarly, the DOL report notes,

> ". . . [current selection] criteria are scarcely validated and may relate only remotely to the probable gain of admitting a defendant to the project. One would therefore be justified in arguing that a relaxation of eligibility criteria, with random selection of participants from among the eligible population is no less fair than current practice." [90]

As to the lesser service vs. research worries of program staff, as Zimring would have it, these can be dismissed. ("An unfriendly critic might even paraphrase: 'The program was too experimental to be an experiment'.") [91] In fact, if commitment to program evaluation exists within a sponsoring agency, project administrators can probably easily overcome staff resistance to non-service objectives. In commenting on the absence of comparative data in eight of the nine DOL projects, the former director of the ninth noted his belief that, "if the Department had insisted that control groups be selected, the task would have been completed."[92]

If the DOL study is any guide, legal and ethical opposition to the use of rigorous evaluation procedures may be unduly magnified by the political and financial hesitations of project administrators. The resource issue can only be resolved by a separately and adequately funded evaluation that need not rely on program staff to generate evaluative data. Political opposition based on fear of criticism or strong belief in the value of the program independent of any quantitative demonstration, is a more intractable problem which is unlikely to disappear until program sponsors begin asserting their evaluative rights more than they presently do.

Other Questions of Interest

The discussion thus far has focused on the critical need to determine the independent impacts of diversion and intervention services on the subsequent recidivism rates of program clients. Indeed, while any analysis of an event as difficult to measure as criminal recidivism, [93] may be received with suspicion by policy-makers, if project proposals are any guide it is nonetheless the issue of primary concern to those considering the adoption or institutionalization of such an alternative.

Clearly, however, other potential program effects cannot be ignored. The construction of appropriate control groups can permit a long overdue examination of other goals which may in fact represent the more realistic aspirations of the intervention design. Prime among these are the direct benefits of program service strategies. Although attempts have been made to measure the effects of employment and counseling support with what may be reassuring results, as we have seen, there is very little evidence that the outcomes achieved would not have occurred

in the absence of intervention.

Three areas of inquiry are suggested:

- In manpower-service programs, the ability of participating defendants to find and hold employment at reasonable wage levels;

- Where counseling is the prevalent mode of service delivery, the measurement of attitudinal benefits such as the client's sense of empowerment to change his status;

- The effects of different service strategies on different sub-groups of participants.

The latter question may be particularly important to the future development of court service programs. There are surely many defendants who will require no service. Opposed to this group are those who will neither be released before trial nor if convicted, returned to the community without some assurance that a viable system of supervision and services is available. Regardless of the intervention point, experiments to determine the appropriate level and type of assistance required by different individuals can yield useful information. In fact, in cases where a completely unsupervised control group is objectionable due to the acceptance of more severely charged or disadvantaged participants, the random assignment of eligibles to different types of supervision is a promising alternative.

To define a final area in need of continued evaluative inquiry, we return to one of the more pervasive rationales for diversion programming – namely the desire to minimize the potentially negative consequences of full criminal prosecution (for the courts as well as the accused) by diverting defendants and dispensing case dismissals to those who fulfill the conditions of the pretrial service period. Whether or not there is any concern for measuring defendants' post-program recidivism or employment prospects, at the very least, programs ought to substantiate the assumption that through this process their participants (and host courts) are getting a better deal.

We know that projects have demonstrated an ability to meet certain intake goals [94] and to secure dismissals for 60 to 90% of all entering participants.

We generally do not know how large a share of the total population of criminal defendants the intake represents and how it corresponds to the general population, nor whether the disposition of participating defendants would have differed without intervention.[95]

Determining the impacts of intervention on pretrial status, adjudication and sentencing is critical to the development of a better understanding of how diversion is affecting the workload or caseload of the criminal courts and related correctional agencies. Most important, the information may be employed to support any assumptions used in calculating the costs and benefits of diversion programming. If, as Zimring has suggested, a project saves both court costs and suffering by diverting those who would otherwise be punished, it may be doing a good job if it performs as well as the normal criminal justice process (*vis a vis* recidivism). On the other hand, if scarce resources are expended on those who would otherwise drop out of the system, a project must do better to justify the costs of treatment.[96]

Among the evaluations reviewed, cost analyses ranged from simply reporting funding levels and per capita costs to attempts to compare program costs to the costs saved by diverting cases from the traditional criminal justice process, by providing participants with greater earning capabilities or by reducing recidivism. (The most sophisticated cost/benefit analysis embraced all three of these benefits.[97]) Most evaluators reported that projects were certainly paying for themselves and generally appeared less costly than normal alternatives. Again, however, because these analyses drew on methodologically deficient evaluation designs, the evidence is far from conclusive.[98] Cost/benefit analysis at its best may involve complex assumptions in the assignment of monetary figures to program costs and benefits. Certainly, more adequate experimental designs would provide a more convincing basis for these assumptions.

Design Considerations

Many of the research questions identified above are clearly best answered through comparative analyses based on data generated by tracking randomly selected participant and non-participant groups. Apart from the legal and practical issues associated with implementing this classical ex-

perimental design, questions have begun to emerge regarding the relevance and significance of this method to the operational concerns of court and program managers. [99] There are, of course, many questions pertaining to the more qualitative dimensions of pre-trial programs that do not require the rigor of an experimental design. In-depth participant interviews, the introduction of external observers and the development of case study material can serve a useful purpose in defining and assessing the consequences of alternative program policies and procedures.

In describing several program variations here, it is clear that there are important issues of policy and law that must be considered in determining the most appropriate organizational affiliation for pre-trial programs. These in turn raise other operational issues, including the nature of a program's relationship with the justice system, the type of staff to be employed, etc. Although the lines of the debate have been drawn, these issues have not been considered in detail as they are secondary to the question of whether in fact we have a tested commodity up for grabs. They are, however, questions that clearly deserve further exploration in conjunction with quantitative evaluation efforts.

In addition to expanding the type of information used in program evaluation, the range of participants on whom data are collected also ought to be broadened. The importance of including unfavorables in any participant data collection efforts has been referenced in earlier discussions and warrants some repetition here. First, no valid comparisons between participants and non-participants can be made unless the participant group contains both favorables and unfavorables. Second, even in the absence of program/non-program comparisons, by restricting data collection efforts to project successes, we miss much valuable information on the ways in which projects fail and hence, on what might be done to correct those failures. [100]

The Evaluation Process

In concluding, two issues that need to be addressed relate not to specific research topics but the manner in which research and evaluation projects are conceived and implemented.

– *Research Review and Coordination.* All too often, program design and evaluation occur in a fairly isolated framework. Data systems and analysis plans are not only seldom based on informed choices, but are formulated in a manner that inhibits any assessment of the comparability of results among related efforts. Although the publication of research guidelines and standard information system packages is one means of addressing this problem, a more direct mechanism for assisting in the development of systematic experimentation appears to be required. The National Association of Pre-Trial Services Agencies is probably in the best position to respond to this concern, perhaps by establishing an evaluation advisory committee upon which its constituent agencies might draw for design review and quality control.

– *Research Orientation.* A more sensitive issue is the role often carved out for program evaluation activities. At the project level, the notion of evaluation appears too easily perceived as an exercise in justification. Competition for scarce resources creates pressures to allocate the bare minimum to evaluation activities; those activities in turn are often viewed as a vehicle for generating program support -- either to justify continued funding or to build the official and community support critical to the initial acceptance and ultimate institutionalization of a diversionary alternative. Program proponents may be intuitively convinced of the rehabilitative value of such a strategy: it is diverting young defendants from a fragmented and ineffective system of justice; it is providing services where none were previously available; it is promoting community responsibility for the behavior of members of the community; it is generating an awareness on the part of court officials of the social consequences of their actions. In a sense, these are effects that need no statistical demonstration other than the existence and acceptance of such a program within the structure of the community and the courts. Resting on this support, research is then conducted to simply justify that existence rather than explore just how program services are affecting the behavior and life styles of participating defendants. To obtain funds, to "sell" a program of this nature to policymakers, some program impact -- usually reduced recidivism -- must be demonstrated. Since the incidence of repeated criminal behavior is extremely difficult to measure, it is not surprising that program philosophy and research methodology combine to produce equivocal results.

At times, we are told that reports containing evaluation findings were not ever meant to represent rigorous evaluation attempts. Rather, they should

be viewed as public relations pieces geared to generate an appreciation of the concept on the part of its consumers; those concerned with evaluating the issues of program effectiveness and efficiency should not look to these reports for guidance but should seek more "scientific" information. However genuinely motivated, one cannot help but ask why the general public does not deserve the same consideration as the "scientific" community.

Even where the evaluation process may be initiated as a serious research effort, it is seldom conducted as a totally objective endeavor independent of the project under observation. While the reported results may not be intentionally misleading, a high degree of optimism may be conveyed. As a consequence, the reader may not only be discouraged from engaging in any debate but led to further distort the evaluation findings.

The solution is not easily found. Surely, however, it includes wiser allocation of evaluation resources, more objective, independent evaluation procedures, less pressure to produce or perish through longer experimental funding periods, and greater efforts to realistically define the capabilities and limitations of new programs as well as program evaluation efforts.

FOOTNOTES

[1] Elizabeth Vorenberg and James Vorenberg, "Early Diversion from the Criminal Justice System: Practice in Search of a Theory," in Lloyd E. Oblin, ed., *Prisoners in America* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p. 152.

[2] Donald Cressy and Robert McDermott, *Diversion from the Juvenile Justice System* (Ann Arbor, Mich.: National Assessment of Juvenile Corrections, University of Michigan, 1973), p. 6.

[3] Daniel Freed, *Statement on Proposed Federal Legislation Regarding Pretrial Diversion* Before the Subcommittee on Courts, Civil Liberties and Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 93rd Congress, 2nd Session, February 12, 1974.

[4] This study, conducted by Abt Associates Inc., was supported by Contract NSF-C 813 from the National Science Foundation. The results are reported in two volumes entitled *Pre-Trial Services: An Evaluation of Policy-Related Research.* Volume I contains a synthesis which includes the material presented here; Volume II includes the synthesis, reviews of all research documents evaluated, and annotated bibliographies.

[5] *See* Charles Ares, Anne Rankin and Herbert Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole," 38 *New York University Law Review* 67 (1963).

[6] The Federal Bail Reform Act of 1966 authorized the use of a number of conditional release strategies – daytime release, third-party release, release with limitations on travel, residence, etc. (18 U.S. Code 3146).

[7] The notion of pre-trial diversion became officially visible in 1967 with the recommendation of the U.S. President's Commission on Law Enforcement and Criminal Justice, for the: "Establishment of explicit policies for the dismissal or informal disposition of the cases of certain marginal offenders" and the "Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required." *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967), p. 135.

[8] Traditional discretionary diversion practices are commonly based on the prosecutor's decision to screen out selected cases based on a variety of circumstances

(severity of the offense allegation, conviction probability, extent of court backlog, etc.). For a discussion of discretion in the context of diversion, *see* Raymond Nimmer, *Diversion: The Search for Alternative Forms of Prosecution* (Chicago: American Bar Foundation, 1974). Most pre-trial intervention programs have flourished informally, deriving their authority from the discretionary powers of the prosecutor or court. Until recently, Connecticut was the only state that had a statute formally authorizing pre-trial diversion of non-addicts (Conn. Public Act No. 73-641, June 12, 1973). During 1974, PTI legislation was enacted by Florida, Massachusetts and Washington.

[9] *See* U.S. President's Commission, *op. cit. supra* note 7.

[10] In the single site where comparative data were available, the DOL second round study reports known pre-trial dispositions for a comparison group of non-participating defendants as follows: 45% Released on Recognizance; 15% released on money bail or bond; and 42% detained an average of one day. In at least one site, "eligibility for ROR constituted a precondition for referral to the program (San Antonio), eliminating the possibility for showing any effect at all on detention populations." Abt Associates Inc., *Pre-Trial Intervention: A Program Evaluation of Nine Manpower-Based Pre-Trial Intervention Projects Developed under the Manpower Administration U.S. Department of Labor, Final Report* (Cambridge, Mass.: July 1974), p. 188. Hereafter cited in the text as the "DOL Study."

[11] Wallace Loh has suggested that the accused can be placed on a continuum or scale ranging from low to high priority of prosecution. . . those at the lower end would be screened out at the pre-trial stage; those in the intermediate section would be diverted before trial; and those at the upper end would have top prosecution priority. Existing eligibility criteria [for diversion] normally state only the upper limit of the second section (e.g. misdemeanor charge and no more than one prior conviction); the lower limit is left undefined. Consequently, there is the risk that those who should be screened out are funneled into pre-trial diversion. "Pretrial Diversion from the Criminal Process," 83 *Yale Law Journal* 827 (1974)

[12] Roberta Rover-Pieczenik, *Project Crossroads as Pre-trial Intervention, a Program Evaluation* (Washington, D.C.: National Committee for Children and Youth, 1970), p. 2.

[13] U.S. Department of Labor, Manpower Administration Order No. 14-63, Subject: Prohibition Against the Use of Funds Appropriated Under the Manpower Development and Training Act of 1962 to Train Prison Inmates" (12/10/63). Under subsequent directives (MAO 26-65 and 8-67), this policy was revised first to permit training prison inmates affected by work release laws, and finally, to establish policies for implementing Section 251 of the MDTA of 1962, as amended in 1966.

[14] Early eligibility criteria defined a range of demographic and entry characteristics of prospective participants that did not specifically include failure to pass an ROR

screen where an ROR alternative was available. Presumably, employment and income criteria provided some assurance that programs would reach detention candidates. On the other hand, prior record criteria as well as residence requirements might have eliminated some ROR rejects from consideration. *See* also note 10.

[15] Although these goals have been shared by all manpower-based intervention projects and are those most amenable to quantification , all programs have generally pursued a range of qualitative objectives that relate to their relationship with the criminal justice system, the community and existing community service networks (e.g., to provide the court with community-based alternatives to conventional adjudication, to involve criminal justice officials in the rehabilitative planning process, to provide expanded career opportunities for indigenous non-professionals and ex-offenders, to stimulate the interest of social service agencies in the plight of the accused).

[16] 60% of Crossroads' first admissions were 18 - 19 year olds and an additional 23% between the ages of 20 - 21; 39% were unemployed, 39% employed and 25% were students [Total 103%: *sic*]; 61% were charged with petty larceny. Rovner-Pieczenik, *Project Crossroads.* In general, the prior record data reported in most evaluations was considered of low reliability by the researchers. Given the difficulty involved in accessing records under the time constraints placed on the admission decision and the incomplete nature of those records, most prior record distributions are probably conservative estimates.

[17] "The best measure of the success of [pre-trial intervention] is illustrated by the fact that the two initial projects, the Manhattan Court Project in New York City, and Project Crossroads in Washington, D.C. have both been picked up and expanded by the local system." *See Proceedings: The National Workshop of Corrections and Parole Administration,* American Correctional Association (Washington, D.C.: 1972), p. 17. Viewing the achievement of institutionalization, there is a sense that program administrators and funders were somewhat restive about holding the concept accountable to the vagaries of recidivism as a measure of the program's value. Consequently, program feasibility, normally a demonstration that might precede or accompany the measurement of effectiveness, appears to have superceded that measurement entirely.

[18] Full critical reviews of both documents are contained in Abt Associates' Final Report to the National Science Foundation, *Pre-trial Services.* Earlier critical comments may be found in analyses by Franklin Zimring, "Measuring the Impact of Pretrial Diversion from the Criminal Justice System," *The University of Chicago Law Review,* Volume 41, Number 2 (1974); Wallace Loh, "Pre-Trial Diversion from the Criminal Process," and Daniel Freed, *Statement on Proposed Legislation.*

[19] *See* Abt Associates Inc., *Pre-Trial Intervention.*

[20] Although the concept was the same among the nine sites, service strategies and target populations varied. However, with the exception of the Baltimore site (the only project to focus exclusively on a juvenile court population), the remaining eight replications were basically designed to offer employment-related assistance to adult criminal defendants. In only one site (Atlanta) were project funds administered by the State Department of Labor. Other program sponsors or subgrantees included a private for-profit firm (Baltimore), a non-profit consulting agency (Boston), a multistate Mexican-American manpower agency (San Antonio) and a community service organization (Minneapolis' Urban Coalition). Full funding was provided by the Department of Labor for the first 18 to 20 months of each project's operations and approximately 50% of all annual operating costs for the first year following the expiration of the initial grants. Thereafter, these projects have operated under a variety of combined Federal, State and local funding arrangements. Reportedly none have yet been totally institutionalized as a function of normal court operations. While most have suffered cutbacks in their initial funding levels, all with the exception of the San Antonio project (which failed to secure re-funding after its initial demonstration period) continue to operate. *Ibid*, Chapter 11.

[21] In the California sites, for instance, eligibility guidelines restricted admission to selected minor misdemeanors, predominantly shoplifting charges. This policy resulted in a highly disproportionate number of lower-risk female admissions. In the Atlanta project, where charge criteria included possession of less than an ounce of marijuana, participants were characterized by the absence of prior records and the presence of substantial family income. *Ibid.*, Chapter 2.

[22] In its simplest form, motivational testing occurs during the screening interview when the project screener tries to determine whether the candidate is *sincerely* interested in the program or sees it as an easy out. In more elaborate form (e.g. the Boston procedure) candidates are required to attend orientation and assessment sessions during a two-week preliminary continuance period. *Ibid*, Chapter 3.

[23] To study the screening process of the Manhattan Project, Zimring obtained a sample of 205 consecutive docket numbers indicating weekday arraignments during October 1971. One out of five were "written up" by the project (indicating the project's eligibility criteria were met) but 35 of the 39 write-ups did not enter the project. Reasons for exclusion (determined by examining a second sample of 201 consecutive write-ups of whom 14% entered) included 14% defendant rejections, 15% guilty pleas and 20% drug or alcohol involvement. Zimring, "Measuring Impact," p. 229. Similarly, the DOL Study has indicated that to capture 3391 participants during a 12-18 month period over all sites, the program screened 7593 defendants (which did not necessarily represent all available eligibles). Screening operations were typically performed in a one or two-stage process. In the single stage process (exemplified by the diversion procedure for accused misdemeanants in Minneapolis) all necessary steps were completed at arraignment. Because a single stage procedure can re-

sult in haste and confusion and may restrict the ability of project staff to present informed arguments for diverting more serious cases, many projects have instituted a two stage procedure, requesting a preliminary continuance for purposes of investigation and orientation. While the latter offers better procedural safeguards, the former lends itself to more immediate intervention. Abt Associates Inc., *Pre-Trial Intervention*, p. 42.

[24] According to Wallace Loh, "Some public defenders in the District of Columbia felt that unfavorable termination from Project Crossroads would prejudice defense efforts when prosecution is re-instated because there would be reduced hope of negotiating a favorable plea. Indeed, current prosecutorial policy is to give top priority to the prosecution of unfavorably terminated participants." "Pretrial Diversion from the Criminal Process," p. 842 at note 81.

[25] In most of the nine second round sites, project recommendations for dismissal were accepted by the court over 90% of the time. According to the DOL Study, "the only exceptions were the California and San Antonio sites where 89% of favorables in Santa Rosa, 66% in Hayward, 24% in San Jose and 15% in San Antonio were not granted their recommended dispositions by the court." Apparently, judges were concerned that the submission of a formal recommendation represented an intent to unduly influence the discretionary authority of the prosecutor or court. Hence, these cases (over 300) successfully completed an informal "probationary" period only to be convicted and placed under normal or summary probation. Abt Associates Inc., *Pre-Trial Intervention*, p. 80.

[26] Among the nine sites, San Jose, Hayward and Cleveland reflected the lowest unfavorable termination rates at 11%, 15%, and 15% respectively (N=273, 236 and 678). These sites were characterized by 27-40% female entrants, high percentages of petty theft defendants (55-95%), and over 75% with no prior record. Minneapolis and Boston, showing the highest termination rates (36%) also included the highest percentages with adult and/or juvenile records (46 and 62%) and the highest proportions of participants unemployed at arrest (65% and 67%). Needless to say, individual project rates of unfavorable terminations reflect not only the characteristics of project clients, but the efficiency of services delivered, the project's relationship with its host court and prosecutor, and the specific nature and interpretation of project termination criteria. Nevertheless, the evidence of a relationship between pre-program characteristics and in-program success or failure is fairly strong. Abt Associates Inc., *Pretrial Intervention*, Chapter 2.

[27] The Boston Court Resource project is perhaps the best example of a project with aggressive and flexible eligibility standards. In addition to the distributions noted above (cf. note 26), the first 327 enrollees in this site were often felony-charged (36%) including slightly better than 17% in the robbery/burglary categories. *Ibid*, Chapter 2.

[28] The study found no significant differences in mean number of rearrests during the first three months after the originating charge. (.073 vs. .179, sig. at .226), a significant difference for the next two three-month intervals (.049 vs. .179 and .052 vs. .214, sig. at .05 and .01) and no significant differences over the next two six-month intervals (.087 vs. .179 and .065 vs. .143, sig. at .21 and .18). Participant n=100; non-participant n=28. These statistics are reported in a reanalysis of the DOL study data contained in Zimring's critical review of that study. *See* Abt Associates, *Pre-trial Services.*

[29] For a discussion of constitutional requisites in the development and administration of eligibility criteria, see the National Pre-Trial Intervention Service Center, *Monograph on Legal Issues and Characteristics of Pre-trial Intervention Programs* (Washington, D.C.: American Bar Association, April 1974). A critical review of this monograph (which covers a variety of legal issues in addition to those associated with eligibility) is contained in Abt Associates' Final Report to the National Science Foundation. For other discussions of the legal issues in diversion *see:* Daniel L. Skoler, "Protecting the Rights of Defendants in Pretrial Intervention Programs," 10 *Criminal Law Bulletin* 473; Daniel J. Freed, Edward J. DeGrazia, and Wallace D. Loh, *New Haven Pretrial Diversion Program – Preliminary Evaluation (May 16, 1972 – May 1, 1973)*, New Haven, Conn. June 1973; Robert M. Balch, "Deferred Prosecution: The Juvenilization of the Criminal Justice System," 38 *Federal Probation* 46 (1974); Nancy Goldberg, "Pre-Trial Diversion: Bilk or Bargain," 31 *NLADA Briefcase* 6 (1973); National District Attorneys Association, *Monograph on Philosophical, Procedural and Legal Issues Inherent in Prosecutor Diversionary Programs* (Chicago, Ill.: July 1974).

[30] Thomas K. Peterson, "Metropolitan Dade County (Florida) Pretrial Intervention Project: Eighteen Month Report (1/1/72 - 7/18/73)." Miami, Florida.

[31] Dade County's analysis of recidivism is reported in a supplement to the Eighteen-Month Report: Richard Nichols, Alan M. Rockway, and Barry Greenberg, "Research Supplement: Dade County Pretrial Intervention Program: 1974 Project Evaluation and Statistical Analysis of Recidivism and Selected Treatment Variables by Experimental and Control Groups and Pre and Post Data Comparisons." (Miami, Florida: May 16, 1974). The comparison group used differs from others reported here as it contained defendants randomly assigned to control status during the early months of project operations. However, the selection process yielded a very small group of controls (34) who were then compared with a participant group containing many defendants selected well after control selection had ceased. Without any control for the different follow-up periods between groups and among the members of either group, interpreting the findings is a difficult if not impossible task.

[32] Ellis Perlman, "Deferred Prosecution and Criminal Justice: A Case Study of the Genesee County Citizens Probation Authority," *A Prosecutor's Manual on Screening and Diversionary Programs* (Chicago, Ill.: NDAA Publications).

[33] *Ibid.*, p. 81.

[34] *Ibid.*, p. 4, 5.

[35] *Ibid.*, p. 21.

[36] *See* W. Loh, *op. cit. supra,* note 11. *See* also note 48. Parenthetically, we do know that one consequence of diversion for the defendant who participates in CPA is the payment of a $100 probation service fee (adjustable if circumstances warrant). *Ibid*, p. 99.

[37] In his congressional testimony, Freed has suggested that, ". . . the Congress should examine with great care the question whether formal pretrial diversion programs are not much more akin to the sentencing powers and procedures of judges than to the traditional role of prosecutors: i.e. to judicial decisions prescribing controls over future conduct, rather than to prosecutorial decisions regarding whether to charge a person with a criminal offense, or to prosecute or nolle a case after the charge or indictment has been filed. Diversion must be recognized for the many essential respects in which it constitutes a pretrial sentence. A person (1) is arrested for a crime, (2) elects not to contest the charge, (3) submits to official supervision and control over his conduct, and (4) is subject to future invocation of criminal charges or sanctions if he fails to comply. At least two labels often attached to diversion candidly acknowledge the similarity to sentencing: pretrial probation, and preprosecution probation."

[38] Bruce J. Cohen, *Operation Midway, Final Evaluation – Phase I (February 1, 1971 - November 30, 1971)* (Mineola, N.Y.: Probation Department, Nassau County Courts).

[39] *Ibid.*, p. 15. Nevertheless, the apparent exclusion of ex-offender paraprofessional staff would undoubtedly be considered a severe liability by most program administrators. Despite the administrative, personal and sometimes legal problems associated with hiring and managing these staff, the use of non-traditional personnel (and their unique human relations skills) is generally considered an important feature of the intervention design.

[40] *Ibid.*, p. 9.

[41] *Ibid.*, p. 1.

[42] ABA Standard 4.2 (Standards Relating to Sentencing Alternatives and Procedures) recommends that the pre-sentence investigation not be undertaken until after the adjudication of guilt. Similarly, in discussing the assumption of diversionary responsibilities by Probation, Freed notes the possibility of running afoul of Rule 32 (c) (1) of the Federal Rules of Criminal Procedures regarding non-disclosure of pre-sentence reports prior to conviction. The National Pre-Trial Service Center *Monograph on Legal Issues* indicates that no confidential

privilege between counselor and divertee exists and suggests that agreements creating a qualified privilege protecting communications of prosecutorial interest may be desirable. It is not clear whether such a privilege has been established by Midway or whether it can be meaningfully sustained given the traditional reporting functions of the Probation agency.

[43] It has been argued that defense counsel should be involved in these procedures and specifically that the unsuccessful diversion participant should be afforded a termination hearing with counsel present. *See* National Pretrial Intervention Service Center, *Legal Issues and Characteristics of Pretrial Intervention Programs* (Washington, D.C.: ABA Commission on Correctional Facilities and Services, April 1974).

[44] According to the 1970 Census, Nassau County has a median family income of $14,600, making it the richest county in New York and the sixth richest in the United States. The Midway report does not indicate what proportion of their enrollment are represented by retained vs. public counsel. The document does, however, contain many letters of endorsement from retained attorneys.

[45] An evaluation of Phase II has apparently been completed, but was not available for this review. A more comprehensive evaluation by the American Bar Foundation is reportedly in progress but will not be available for several months.

[46] Which they are not, of course, since they were terminated for non-performance and therefore clearly are not a representative sample of participants. Regrettably, in spite of numerous published cautions that the only valid comparison that can be made is between participating defendants (favorables and unfavorables) and a similar group of non-participating defendants, program administrators apparently continue to view unfavorables as an acceptable comparison group, e.g., "Because Project Crossroads found no significant difference between unfavorable terminations in its Diversion project and a control group of non-participants, the above-mentioned follow-up study finds it unnecessary to use a strict control group to measure recidivism, for a comparison group of unfavorable terminations is sufficiently valid." (Memorandum from the New Haven Pre-trial Diversion Program.) One can only hope that such comparisons will become obsolete very soon.

[47] National Institute of Mental Health, Center for Studies of Crime and Delinquency, *Diversion from the Criminal Justice System* (Washington, D.C.: U.S. Government Printing Office, 1971), p. 25.

[48] For the nine second-round programs, costs per favorable termination only ranged from $835 to $2172. *See* Abt Associates, *Pre-trial Intervention: A Program Evaluation*, p. 173.

[49] Within the comparison group used for the Crossroads evaluation (n=107) 54% were nolled, dismissed or acquitted. Although 46% were convicted, only 6% were sentenced to jail or prison. In New Haven, there were no jail sentences among a non-participant group of 173. In Manhattan, 49% of a non-participant group were convicted but only 7% received a jail sentence. In the single site providing comparison group data to the DOL study, of 50 comparison cases, only 2 were dismissed or acquitted. Although the remainder were convicted, most were fined or placed on probation, and 11 were incarcerated. Needless to say, since there is some evidence of a selection bias that favored participants in some of these evaluations, the disposition of comparison group cases does not necessarily represent the fate of participants in the absence of intervention.

[50] *See* note 29 for references regarding plea requirements.

[51] Perlman, "Deferred Prosecution and Criminal Justice," p. 146.

[52] Sharon K. Narimatsu, "Deferred Prosecution and Deferred Acceptance of a Guilty Plea," *A Prosecutor's Manual on Screening and Diversionary Programs* (Chicago, Ill.: NDAA Publications).

[53] Although a guilty plea may be constitutionally permissible, the ABA's *Legal Issues Monograph* questions whether the requirement of a formal plea is the least restrictive method available to serve the state's interest, concluding that a formal guilty plea should not pre-condition diversion. According to the authors, any form of informal guilty plea also does not measure up to the position taken. See Abt Associates, *Pre-trial Services: An Evaluation of Policy-Related Research.*

[54] Over the nine sites covered by the DOL study, 24% (873) of 3598 participants were returned for prosecution on their original charge, with the following results: 19% (158) dismissed/acquitted/continued without finding; 29% (357) convicted (143 probation sentences, 27 fines, 58 sentenced to prison, and 27 suspended sentences), 24% (209) absconded with bench warrants outstanding and 28% (249) had dispositions pending or not reported. Abt Associates, *Pre-trial Intervention,* p. 81.

[55] The DOL study suggests that while defendants are responsive to the manpower services delivered (measured by increased chances for employment over the short-term), employment benefits may be coming at the expense of job quality (status and salary). *Ibid.*, p. 129.

[56] Many projects have experimented with the delivery of group counseling therapies. While varied in format -- from rap sessions to structured group experiences -- some field observers have expressed the concern that without close professional supervision, it can be a highly difficult counseling vehicle to manage.

[57] Phillip Ginsberg, "Diversion and Referral Programs, the Lady or the Tiger," (Unpublished paper based on comments presented at an NLADA Annual Conference). As Seattle's Chief Public Defender, Ginsberg has instituted a Pre-Sentence Counseling Unit that provides non-legal assistance to indigent clients to better ensure effective client advocacy at sentencing. While its service objectives are similar to those of pre-trial intervention programs, its primary systemic objective is to assist in the preparation of the pre-sentence report. (King County Superior Court Rule 101.04(j) requires the Prosecuting Attorney, Defense Counsel and the Adult Probation and Parole Office to submit pre-sentence reports to each other -- except that Probation need not be given a copy). King County Law and Justice Planning Office, "A View of the Pre-Sentence Counseling Program of the Seattle-King County Public Defender Association," Sept. 1974.

[58] Since rearrest constituted grounds for unfavorable termination, we would expect a substantial difference between favorables and unfavorables during the period of program supervision. After that point, however, the DOL study found no significant differences between the two groups in either number of rearrests or mean time to rearrest. The study concludes that although there were potential deficiencies in the data, "There is clearly a strong argument to be made that over the long term, unfavorables were rearrested no more often than favorables -- their rearrests simply occurred sooner." Abt Associates, *Pre-trial Intervention: A Program Evaluation*, p. 14 (Summary Volume).

[59] Patricia A. Wald, "The Right to Bail Revisited: A Decade of Promise without Fulfillment," in Stuart S. Nagel (Ed.) "The Rights of the Accused," *Sage Criminal Justice Annals*, Vol. 1 (1972), p. 188.

[60] Perlman, "Deferred Prosecution and Criminal Justice," p. 4.

[61] The Speedy Trial Act of 1974 (H.R. 17409, S. 754) is effective in yearly stages over a five-year period, providing at the end of that period a maximum of 100 days between arrest and trial of defendants under Federal Court jurisdiction. The Act also provides for the creation of ten demonstration pretrial service agencies that would function to collect and verify information pertaining to eligibility for release; recommend conditions of release; supervise released persons; operate facilities for releasees including halfway houses, narcotics and alcohol treatment centers and counseling centers; and provide social and employment assistance.

[62] National Pretrial Intervention Service Center, *Legal Issues*, p. 68.

[63] Daniel Freed, *Statement on Proposed Federal Legislation.*

[64] To be distinguished from efforts to decriminalize public drunkenness or other drug-related offenses, which are dependent on the availability of community treatment resources. In 1973, Oregon abolished criminal penalties for marijuana use, substituting civil fines. Denver, Colorado, Ann Arbor and Ypsilanti, Michigan, have followed a similar course. Redefinition of disorderly conduct and vagrancy statutes has been recommended by numerous advisory groups in accord with the American Law Institute's Model Penal Code.

[65] Abt Associates, *Pre-trial Intervention,* p. 195.

[66] Daniel J. Freed, Edward J. DeGrazia, and Wallace D. Loh, *New Haven Pretrial Diversion Program – Preliminary Evaluation* (May 16, 1972 – May 1, 1973), New Haven, Conn., June 1973.

[67] National Institute of Mental Health, *Diversion from the Criminal Justice System,* p. 22.

[68] Price suggests police referral of petty offenders to neighborhood offices (staffed by community affairs officers) who would screen cases and choose among several dispositions: release, referral to community agencies or to the prosecutor. *See* "A Proposal for Handling of Petty Misdemeanor Offenses," 42 *Connecticut Bar Journal* 55 (1968).

[69] A program in Columbus, Ohio, refers citizen complainants and commercial bad check cases to trained law student mediators who attempt to resolve the difficulty through a brief administrative hearing. *See* National Institute of Law Enforcement and Criminal Justice, LEAA, *Citizen Dispute Settlement: The Columbus Night Prosecutor's Program* (Washington, D.C.: 1974).

[70] National Institute of Mental Health, *Diversion from the Criminal Justice System,* p. 20. Needless to say, diversion at any stage requires the development and application of uniform eligibility and referral criteria.

[71] Freed, DeGrazia, and Loh, *New Haven Pre-trial Diversion,* p. 101.

[72] Carl E. Anduri, Jr. and Timothy P. Terrell, "Administration of Pretrial Release and Detention: A Proposal for Unification," 83 *Yale Law Journal* 153 (1973).

[73] *See* National Institute of Law Enforcement and Criminal Justice, LEAA, *A Handbook on Community Corrections in Des Moines* (Washington, D.C.), Chapter IV.

[74] *See* Peter S. Venezia, *Pre-Trial Release with Supportive Services for "High-Risk" Defendants: A Three Year Evaluation of the Polk County (Iowa) Department of Court Services Community Corrections Project.* Davis, Calif.: National Council on Crime and Delinquency, May 1973. In the absence of a properly controlled experiment, it cannot be determined, of course, whether this result was due to the services delivered to Community Corrections clients or whether it might be attributed to unvalidated and perhaps overly restrictive ROR criteria that provided the Community Corrections Unit with a less than high risk of defendant population. Nevertheless, substantial savings in pretrial detention days were realized.

[75] Community Corrections Unit records are turned over to an affiliated Probation Division for use by the Pre-Sentence Investigation Unit. Both units may offer independent sentencing recommendations. Release bonds of Community Corrections participants may be revoked for non-appearance, re-arrest, failure to make identifiable progress in the program, and client abrogation of the contract signed at release. *Ibid.*

[76] Standard 1.5 of the ABA *Standards Relating to Providing Defense Services* and Standard 13.14 of the *Courts Task Force Report* of the National Advisory Commission on Criminal Justice Standards and Goals recognize the desirability of providing non-legal social work assistance as an integral function of a proper defense.

[77] *See* Institute of Criminal Law and Procedure, *Rehabilitative Planning Services for the Criminal Defense* (Washington, D.C.: Georgetown University Law Center, October 1970). *See* also note 57.

[78] In the District Court, the conviction rate for experimentals was 58% – significantly less than the 88% rate for controls. Dispositions on criminal cases in the Court of General Sessions were not sufficiently large for statistical significance. . *Ibid.*

[79] In discussing the association of pre-trial services with the defense, the ORD evaluation report enumerates two reasons "favoring a Project not tied to defense counsel":

1) "Arguably, more room could be left for social determination less encumbered by the pressures of legal advocacy."
2) "Savings could be realized by eliminating the overlap and duplication in having two pre-sentence investigations and reports in many cases."

Similarly, several disadvantages of a project independent of the defense (specifically one under the administration of probation) are discussed:

1) "There is simply not the requisite commitment or openness to community-oriented planning and rehabilitation [on the part of judges and probation officers]."
2) "For a client who is a marginal offender and a good candidate for diversion or probation, the defense attorney would probably encourage his client's cooperation. But a client with less obvious potential . . . might quite properly be instructed by his attorney not to cooperate for fear of compromising the chances, for example, of favorable negotiation with the prosecutor to whom a [presentence] report would later be given . . . . The defense could scarcely justify facilitating . . . official decisions based on confidential reports when the same phenomenon already has him 'shooting in the dark' in the post-conviction arena of sentencing based on secret probation office pre-sentence reports."
3) Given the confidential advocacy relationship between attorney and client, the defense is ". . . quite probably in the best position to engender within

many defendants . . . a motivation toward determined self-help."

4) "Such services are indispensable to the defense in providing competent legal representation."

This report concludes that "more might be accomplished at least in the near future, by defense-related services which exist in a state of sustained but healthy tension with court probation offices." *Ibid.*, p. 176-180.

[80] Freed, *Statement on Proposed Federal Legislation.* In addition to noting the potential viability of post-conviction services (including expungement), Freed suggests the notion of a voluntary pre-trial probation program that might be equally available to those amenable to diversion as well as those who wish to carry their case to trial: "An alternative . . . might be to recognize that constructive aid to defendants awaiting trial can be offered on a voluntary basis without affecting the timing of a trial or a plea . . . that no reason exists in law or policy for offering richer opportunities under the label of pre-trial diversion than will be available at the post-conviction state, and that all such options should be equally available to defendants whether they plead innocent or guilty and whether they ultimately go to trial or elect to forego trial."

[81] Cohen, *Operation Midway,* p. 37.

[82] Zimring, "Measuring the Impact of Pretrial Diversion," p. 238.

[83] Project Crossroads reported that 8.5% of its participant sample and 21.5% of a comparison group were rearrested three months after their originating charges (i.e. while participants were under program supervision). For one year after program termination, the two rates were nearly identical. For Operation de Novo results, *see* note 28. Although based on a randomly selected control group, Dade County's results [8.8% for participants vs. 20.6% for controls (subsequently updated to 19.8% and 32.4% respectively)] were not based on comparable exposure times for the two groups, invalidating any conclusions. The true magnitude of any impacts reported in other sites cannot be determined due to the unreliability of data sources as well as the potential biases (both positive and negative) introduced by comparison group selection procedures.

[84] Narimatsu, "Deferred Prosecution and Deferred Acceptance of a Guilty Plea."

[85] Zimring, "Measuring the Impact of Pretrial Diversion," p. 235.

[86] Abt Associates, *Pretrial Intervention*, p. 8.

[87] *Ibid.*, p. 10.

[88] With the exception of the Dade County group. *See* note 31.

[89] Zimring, "Measuring the Impact of Pretrial Diversion," p. 237.

[90] Abt Associates, *Pretrial Intervention,* p. 192.

[91] Zimring, "Measuring the Impact," p. 235.

[92] Letter from Bill Henschel, Project Director, Operation de Novo.

[93] The common measure is rearrest rate, which is strictly reliable only if the ratio of crimes actually committed to the rate of rearrest is a constant for all types of crime and for all types of offenders. No evidence exists that this is true, and no clear evidence is likely to emerge, since it would depend upon establishing known ratios for (1) crimes committed to crimes reported, (2) crimes reported to arrests made, and (3) arrests of guilty parties to all arrests. In addition to the accuracy of the measure itself, data collection sources are seldom consistent or complete. To track its single site participant and comparison group samples, the DOL study used three data sources: (1) self-reports and Police and Probation Records; (2) a Basic County Court Record System; and (3) a state-wide system for reporting all fingerprinted offenses. No system necessarily captured the type of arrests it purported to track, and with a single exception no system reported substantially more than 50% of the arrests known against any single group. Needless to say, had regional or Federal systems been accessed, the universe of arrests might have expanded considerably, further diminishing the accuracy of local data sources.

[94] In FY'73, the Manhattan project admitted 2069 defendants; in calendar '73, Dade County served 532; Operation de Novo, 444; and the Boston Court Resource Project, 384. Few projects have served over 500 participants per annum. Although precise baseline figures are not available, these numbers generally represented small fractions of their courts' annual caseloads (e.g. in 1971, Manhattan project participants constituted 1.2% of all criminal defendants in Manhattan).

[95] For available comparisons between participants and non-participants on court disposition, *see* note 49.

[96] Zimring's comments are contained in a review of the DOL study included in Abt Associates, *Pre-Trial Services: An Evaluation of Policy-Related Research.*

[97] John F. Holahan, *A Benefit-Cost Analysis of Project Crossroads* (Washington, D.C., National Committee for Children and Youth, December 1970).

[98] The Dade County report, for instance, assumes that an average cost of $875 is incurred for each case processed through traditional channels (vs. $695 for project participants). This number follows from their reported cost estimates only if 87% of all defendants are given probation and 13% are sentenced to prison. No justification for these assumptions is reported in the study. Similarly, the Crossroads Benefit-Cost Study (although a well-designed comprehensive effort) was undone by a faulty evaluation design that included a non-representative sample of participants

and a non-equivalent group.

[99] *See* Stuart Adams, *Evaluative Research in Corrections: A Practical Guide*, U.S. Department of Justice, LEAA, National Institute of Law Enforcement and Criminal Justice. In Chapter 11, Adams makes two points regarding the use of the controlled experiment in correctional evaluation: that it is not clear that the controlled experiment is an especially productive means of improving either correctional practice or correctional science, and second, that it is possible that it can be made more useful through fuller knowledge of its characteristics and capabilities and by analysis of ways in which its effects can be optimized. (p. 67, 68) According to Adams, the wisdom of asserting that evaluative research should make more use of the controlled experimental design, is not self-evident. (p. 73) In this paper, the preference expressed for the controlled experiment is predicated on two assumptions. First, there are some highly specific, theoretical questions that by now require more definitive answers: given the range of legal and administrative concerns that the diversion concept has evoked, it would appear incumbent upon diversion agencies to provide a sound demonstration of their capacity to meet their ambitions for correctional or systemic change. Second, since many programs have been poorly served by their evaluations (in one sense giving the quasi-experiment an undeserved bad name) answers by means other than rigorous experimentation are not likely to be received with much confidence by those who have already developed profound suspicions that pre-trial intervention is an ill-conceived reform.

[100] In addition to the absence of control or comparison group data in eight of the nine sites covered by the DOL study, unfavorable terminations were not followed up after the point of termination by the same eight sites. As a result, the study was forced to estimate the behavior of unfavorables, severely limiting the reliability of any aggregate performance statistics presented.

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PART II
THE PROGRAM PROCESS IN THREE COMMUNITIES

INTRODUCTION

Described in this section are the specific policies and procedures of three pre-trial intervention projects: Operation de Novo operating in Hennepin County, Minnesota; The Court Resource Program (TCRP)* which serves Boston and several outlying regions of Massachusetts; and a Pre-trial Intervention Project in Dade County, Florida.

Both de Novo and TCRP were established in 1971 with the support of the Department of Labor. These projects were among nine manpower-based court diversion efforts developed under the Manpower Administration and included in a general program evaluation performed by Abt Associates. (This evaluation will be referenced in this document as the "DOL study.") The material presented here is based on our prior evaluation experience as well as additional on-site visitation conducted at the request of the National Institute.

The Dade County Pre-trial Intervention Project began operations in 1972 under a grant from the Office of the County Manager. Since this project was not developed under the initiative of the Department of Labor it was not included in the DOL study. Our observations are based entirely on a review of project-generated documents supplemented by the same on-site validation accorded the remaining two projects.

As developmental efforts, all three projects have undergone many administrative and substantive changes since their inception. This report necessarily captures each at a single point in time (early 1974) and may not include more recent revisions in program policies and procedures. In order to distinguish some of the primary strengths and limitations of each project, this section begins with a summary that relates each project's operations to selected areas of the pre-trial intervention process. Following this overview, project procedures are described in further detail through separate case studies.

* Initially named the Boston Court Resource Project (BCRP), when the project expanded to serve courts in Lynn, Lowell and Woburn, it became simply "The Court Resource Project" to better reflect its regional activities.

Project Goals

Operation de Novo was developed under a mandate to serve the unemployed or employment-handicapped defendant. The project has expressed the following objectives:

- To substantially increase the employability of selected defendants through the application of intensive short-term vocational counseling, employment placement services, vocational training and educational placement;
- To substantially reduce unemployment and recidivism among the defendants served;
- To assist in effecting change within the traditional justice system (by assisting judges and prosecutors in determining the need for prosecution and desirability of diversion; by providing an early alternative to criminal proceedings; by assisting in providing a bridge between the traditionally dichotomized functions of the police, the courts and correctional establishment).

The Court Resource Project was initially introduced into four of Massachusetts' 73 District Courts which have jurisdiction over all misdemeanors and most felonies. Within the first two years the project expanded into six additional District Courts with two more planned for 1974. As a manpower-based project, TCRP, like de Novo, has focused on the dual goals of expanding employment opportunities and reducing repeated participant contact with the police and courts.

The Dade County Project is the only non-independent (and non-manpower) service of the three studied. It is affiliated with and receives strong support from the Office of the State Attorney. It was designed to:

- Serve the defendant (through pre-trial counseling, vocational and educational support, possibility of case dismissal);
- Serve the criminal justice system (through more responsive pre-trial screening, relief for overburdened probation caseloads and reduced participant contact with the system).

Eligibility Criteria

The determination of appropriate criteria for diversion has been of continuing concern to both project administrators and court and prosecutorial personnel. Each project described here was initially designed to reach the youthful adult defendant. Within that category, however, there are a number of distinctions among the eligible groups. Four key criteria reveal the major differences in target populations.

Felony Charges

The Dade County project began as an all felony diversion project, ultimately broadening its scope to include misdemeanant defendants. Although felonies tend to be "soft" (e.g. marijuana possession), over the first 18-month period of operations, they represented 76% of accepted cases.

Operation de Novo began with misdemeanors at the Municipal Court level, eventually expanding to accept felonies under District Court jurisdiction. Defendants charged with felonious offenses comprised 26% of the total project caseload over the first 20-month period of project operations.

The Court Resource Project draws all its cases from the District Courts which process misdemeanors, and felonies at the preliminary hearing stage. Although precise documentation was not available, in early 1974, project staff indicated that felony inclusion was between 41 and 45%.

Dade County's felony diversions occur without the filing of a felony information. Felonies are filed in Minneapolis, occasioning more court records preparation. TCRP's felony cases are not generally diverted at the Superior Court level.

Prior Record Entry Criteria

The basic entrance criteria in Dade County exclude individuals with prior adult records. Despite some relaxation of this standard, it appeared that fewer than 5 to 10% of participants entered with a prior adult record. (Participants are not excluded on the basis of prior juvenile court experience.)

On the other hand, both TCRP and de Novo have served a substantial number of defendants with adult priors. Boston reports that 24% had a prior adult record and an additional 15% a prior juvenile and adult record. In de Novo, 14% reported a prior adult record, and 7% both adult and juvenile priors. In TCRP, participants with two or more adult priors were common.

Charged Offense Criteria

The Boston project has consistently included a wide range of serious offenses, including person-charges, in its active caseload. Operation de Novo has accepted a few serious crimes against the person, but will generally accept any offense where there is no weapon involved. With few exceptions, the Dade County operation completely avoids person offenses as well as more serious property crimes. Overall, close to half

of the participating defendants in Dade were charged with drug-related offenses (47%), in de Novo with larceny and theft (46%). In TCRP, the majority were charged with auto theft and related (20%), alcohol and drug-related offenses (20%) and robbery and burglary (17%).

Socio-Economic Characteristics of Project Participants

Minority participation in all three projects has been roughly equivalent: non-whites have comprised 37% of de Novo's total caseload, 40% of TCRP's participants, and 42% of the participants in Dade County. Over the course of the DOL study, both TCRP and de Novo clients reflected the highest unemployment rates among the nine projects studied, with substantial instability in prior employment records. Roughly three-quarters of the TCRP group and over half of the de Novo group were non-high school graduates.

Reflecting the lower age of project participants in Dade County, a greater number were enrolled in school at intake. Moreover, unlike TCRP and de Novo, unemployment or underemployment is not considered in the determination of eligibility, nor is general economic status. In combination with the prior record exclusion and the generally soft nature of current charges, Dade participants tended to appear significantly less disadvantaged than their counterparts in the remaining two projects.

Case Flow

The Screening Process

In Dade County the Project Director performs a paper screening of court cases, soliciting defendant participation by mail without any personal conference. The project's eighteen-month report shows a 51.6% acceptance rate: 979 were invited and 505 subsequently entered the project.

Boston screeners interview potential clients in court, obtaining a fourteen-day preliminary continuance for further screening and assessment. During the first 27½ months, 1,299 defendants were assessed during the preliminary continuance, and 783 (60.2%) were granted a further continuance for project participation.

De Novo screens misdemeanant candidates in the courts, inviting potential clients to an intake conference. Felony screening procedures require a 2-week preliminary continuance to permit more extensive pre-acceptance investigation. During the first 33 months, 1,777 defendants were screened and 1,146 accepted into the project (64.5%).

Point of Project Intervention

Dade County's invitational letter is generally mailed the day of the court arraignment hearing and the defendant is advised to contact the project office within ten days. In Boston, screeners invite potential clients to an intake conference on the first Tuesday or Friday following the preliminary hearing. Program orientation generally occurs the following week. The overall assessment process requires two weeks before the post-assessment program can begin.

De Novo's misdemeanant clients proceed immediately from the courthouse (if not detained) to the project office for an intake conference. Due to the longer screening process for alleged felons, there is generally a two-week delay prior to acceptance in these cases.

Program Duration

Both Dade County and TCRP offer a ninety-day period of program participation prior to court recommendation. In Boston, not infrequently, the project may ask for a further continuance or the court may decide on its own initiative to continue the case further. Operation de Novo is bound somewhat by court restraint. Typically, juvenile cases are dismissed after 90 days, misdemeanor cases after 180 days, and felony cases after one year.

Successful and Unsuccessful Terminations

The Dade project reports a 77% rate of successful project termination, while both TCRP and de Novo have shown identical 64% rates. In all projects, predictably, the more clearly disadvantaged participant was less likely to fulfill project requirements for a dismissal recommendation. Although there were no major distinctions between favorables and unfavorables in TCRP, in Dade County, blacks were significantly less likely to successfully complete the project, and in de Novo, felony cases were more frequently unsuccessful. Operation de Novo hopes to reduce its 12-month felony participation requirement in an effort to improve the rate of successful felony case participation. In Dade County, although staff were aware of the high minority failure rate, at the time of our inquiry, no revisions in program structure had been devised to meet this problem.

Clients who are rearrested during their period of program participation are regularly maintained in the de Novo project pending adjudication of the reoffense. In TCRP, this decision depends somewhat on the nature of the reoffense but more critically on whether the defendant had been actively and fully participating at the time of the new offense allegation. In Dade County, any new charge is reportedly grounds for unsuccessful termination.

Management

Caseload Standards

Over the calendar year 1973, the Dade County project accepted 532 cases, Operation de Novo, 444 cases and TCRP, 384 cases. Higher caseload standards rather than lower, seemed to be desirable particularly as no staff counselor appeared overloaded. The Dade County and Boston projects have sought to maintain a ratio of 20 cases per counselor, while de Novo's guide is 25 cases per counselor.

Costs per Case

For each project costs per case accepted and per completion are reported below:

Project	Costs per Case Accepted	Cost per Completion
Operation de Novo*	$700	$1,093
The Court Resource Project*	924	1,972
Dade County Pre-Trial Intervention Project	369	531

*Based on figures presented in the DOL study

Implementing Agencies

In Dade County, the grantee for project funds is the Office of the Court Administrator and the project enjoys a strong affiliation with the State Attorney's Office. TCRP was initially developed by a private non-profit contract with the support of the Department of Labor. Following two years of operations, a separate non-profit agency was created - the Justice Resource Institute – as the implementing agency for TCRP as well as other local community-based corrections efforts.

Since its inception, Operation de Novo has been under the sponsorship of the Urban Coalition (first with the support of DOL and more recently under LEAA funds) and eventually hopes to incorporate as an independent non-profit private agency. In contrast to the Dade County effort, both de Novo and TCRP look forward to strengthen-

ing their position as agencies independent of the formal court organization.

Both Boston and Minneapolis maintain advisory groups, although their utilization has been less than desirable. At the time of our inquiry, the Dade project had no organized vehicle for professional or citizen advice and counsel.

Coordination with Pre-trial Release Agencies

In view of their overlapping goals, many project administrators have advocated the combined administration or effective coordination between pre-trial release and pre-trial intervention agencies. In November, 1973, the Miami pre-trial release program was placed under the administration of the pre-trial intervention project director. Since the screening processes can be integrated this move may result in greater cost savings and efficiency.

Apparently, there is no, or at least no effective, ROR alternative in Boston. In Minneapolis, the Department of Court Services performs pre-trial screening and Operation de Novo is considering the transfer of screening responsibilities to that agency.

Service Delivery

Assessment

In Dade County, any prospective participant who responds to the project's recruitment letter, joins the project. During his or her participation there is some exploration of educational, vocational, and psychological needs. This process is more extended in Operation de Novo and reaches its most complete form in TCRP, where educational, vocational, welfare eligibility and rehabilitation needs are thoroughly assessed. While the two-week assessment period in TCRP has drawbacks in terms of costs and immediate intervention, the process appeared to be sound and routinely involved outside agency participation.

Program Focus

Boston, the most expensive of the projects, offers the most comprehensive program. Its three major thrusts are: individual counseling, career development, and group counseling. Minneapolis also stresses individual counseling, provides a more limited vocational dimension than Boston, although more substantial than Miami's and proceeds more on the group educational-informational model than group counseling. Miami requires both an individual counseling and group counseling contact per week for each participant. Its vocational component is weakest, but its target group and

objectives have not called for a strong manpower emphasis.

While any project will have difficulties in achieving effective community service referrals, de Novo appeared to have the fewest problems in such relationships, with TCRP in a roughly equivalent position. Dade County has trailed quite far behind, experiencing problems with mental health referral attempts as well as job training and educational referrals.

In Dade County, group counseling on a confrontive model is seen as pivotal. TCRP has also become attached to the group counseling concept and its opportunity for peer pressure productivity. Operation de Novo has gone through a lot of group counseling styles, has not deemed them extremely productive even when well done, and sees the client treated with more dignity if the process is a more educational-informational one, rather than a psychological maneuver.

Legal Process Issues

In Boston, at the end of the assessment period when client and TCRP agree on acceptance, the TCRP form requesting the 90-day continuance provides space for approval by defense counsel. Reportedly, this is regularly completed. Except for Boston, all defendants are not required to consult an attorney, although in practice many do. Dade County routinely requests consent for diversion from the victim and arresting officer associated with the case.

In Minneapolis, a formal hearing is offered to defendants terminated from the project against their wishes, following notification that he or she will be dropped unless statements at the conference overcome the project's concerns.

None of the three projects require a defendant to admit his offense as a pre-condition for acceptance and in no city are cases routinely or thoroughly screened by prosecutors as to legal probable cause.

Results

No one of the three projects has yet generated sufficient data for an accurate assessment of the effects of the intervention procedure on the clients or courts it has served.

- In Boston, no comparative data is available to permit an examination of any of the project's anticipated impacts on its client group. Thus, althoughThe Court Resource Project has developed an extensive array of services, without any knowledge of the long-range client benefits derived from those services, nor any evidence of measurable systemic impacts, the project's extremely high costs are particularly difficult to justify.

- In Dade County, while case costs are more reasonable, the program appears to have a fairly narrow orientation: coordination with community services agencies seems weak; in-house capabilities do not offer the opportunity for highly coordinated service delivery; and eligibility criteria which exclude defendants with prior records and concentrate on light felony charges, may restrict participation to more likely successes. Although some preliminary evaluative data are available, the results are both tentative and difficult to reliably interpret.

- Case costs in Operation de Novo are twice those in Dade County, yet only one half of those in TCRP. Its target group and service delivery strategy also appear to fall on middle ground with generally flexible entrance criteria and reasonably varied diversion services. Evidence of this project's short-term impact on participant rearrest rates and employment prospects, is encouraging but by no means conclusive.

OPERATION DE NOVO
The Hennepin County Pre-trial Diversion Project

Operation de Novo Project Design

Current theories of deviant behavior describe a range of motives which induce people to commit crimes. One of the more direct of these motives is the simple economic calculation which leads a potential offender to believe that the economic rewards of crime are greater than the economic costs. Society confronts such an individual with a paradox: Material goods appear essential for self-esteem and general well-being; legal means of obtaining these goods may be closed. According to the "opportunity" theorists, the offender resolves this paradox in the only way he or she can: through the commission of a property crime. Once having been convicted of a crime, the offender is again confronted with the same paradox, but in intensified form. Barriers to legitimate employment are raised for persons with criminal records. Conversely, with the commitment to crime as an avenue to self-definition, pressures for recidivism become stronger.

Operation de Novo, developed in 1971 under the sponsorship of the Department of Labor, was designed to break this cycle by providing young defendants with access to legitimate sources of employment. Selected defendants are diverted to the project after arrest and before trial. During the period of program participation, prosecution is deferred and a range of manpower and supportive services are delivered to participating defendants. The client's satisfactory fulfillment of project requirements (steady employment, attendance at counseling sessions, etc.) results in a favorable recommendation ot the court requesting the dismissal of pending charges.

Operation de Novo Eligibility Criteria and Participant Characteristics

De Novo screeners, operating through the Hennepin County Municipal Court (felonies) and the Fourth Judicial District Court (misdemeanors), have adhered closely to their original mandate to serve the unemployed and employment handicapped defendant. Regardless of the charged offense, participants have consistently exhibited extremely marginal employment histories and have been unemployed or tenuously employed at the time of arrest.

When the initial program began (April, 1971) eligibility was limited to misdemeanor cases with no prior record. Officials then discouraged referrals of more inner-city offenders, preferring to refer only what one staff called "eagle scouts." In September, 1971, de Novo began taking felony cases and soon added repetitive juvenile offenders.

Formal eligibility guidelines include the following criteria:

1) No extensive prior record (a discretionary limitation as both adult and juvenile priors are accepted);

2) Male and female over 12 years of age;

3) Charged with a juvenile offense, misdemeanor, or felony (certain felonies, generally involving serious crimes of violence or weapons are excluded);

4) Unemployed, underemployed or a juvenile with serious school adjustment problems;

5) Not addicted to alcohol or drugs;

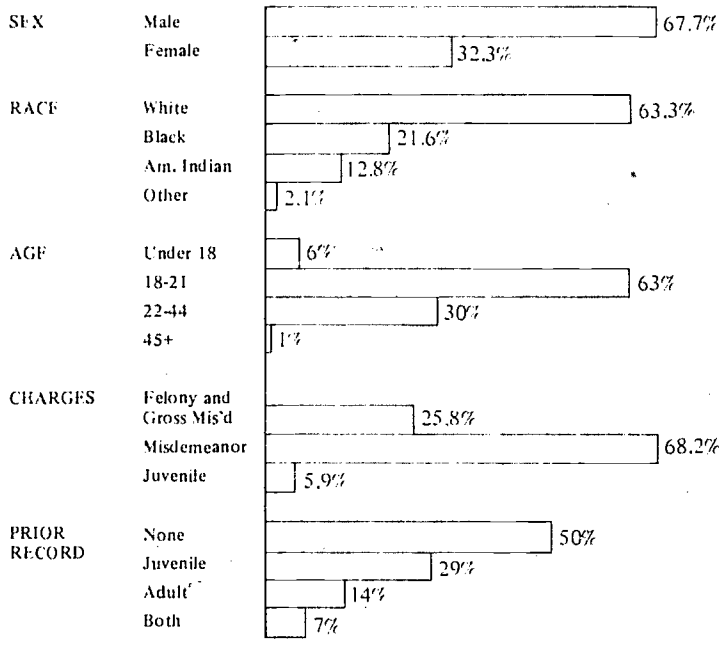
6) Not physically or emotionally unable to secure employment.

Figure 1 presents a number of cumulative statistics describing de Novo's participant group. During 1973, the project handled 444 new enrollments, expanding its felony caseload, increasing minority participation and including a greater proportion of defendants with prior adult records. A breakdown of 1973 participants by specific charged offenses was not available at the time of our inquiry. De Novo is, however, apparently maintaining its focus on defendants charged with property-related crimes. [Figures as of mid-1973 indicated the majority were charged with petty larceny and theft (46%) followed by misconduct (18%), auto theft and related (7%) and alcohol/drugs (7%).]

Figure 1

PARTICIPANT CHARACTERISTICS

(Cumulative Through 12/31/73)



Operation de Novo Screening and Intake Procedures

Each day, de Novo screeners attend Municipal Court arraignments and felony arraignments in the District Court. In the former, they screen the information sheet prepared by the pre-court screening unit of the Department of Court Services and review the court arraignment and jail lists. Both city prosecutors and public defenders may also initiate referrals at this point. Project screeners then interview potential clients and if acceptance into the program is likely, request clearance for diversion from the prosecutor. With the concurrence of the prosecutor, a brief hearing is held before the bench. The judge approves the diversion, continues the court date for six months and a formal case is not filed.

The screening process in District Court is more complex, involving a continued court date 7 to 10 days later, during which time the screener prepares a two or three-page pre-arraignment social investigation. This report is presented to the prosecutor, and with his concurrence, to the judge. Diverted felony cases are filed and continued by the court for one year.

Diverted juvenile cases have no set time frame. These individuals may participate in the program from three months to a year or more. Cases referred by a probation officer are diverted following a finding or plea of guilt, and de Novo is substituted as the major strategy for probation supervision.

The typical referral, picked up during the arraignment screening, walks two blocks from the courthouse to de Novo headquarters for a further intake interview with a counselor coordinator. Following this interview, the case is assigned to a counselor – normally an ex-offender non-professional staff member.

Service Delivery in Operation de Novo

One-to-one counseling support is the major service delivery strategy combined with vocational and educational assistance. Participants with poor vocational records are encouraged to meet with a specialist staff member who runs group and on-to-one sessions on job seeking and job retention skills. When ready to job seek, he or she is referred to the staff's job placer. A specialist who develops jobs is no longer employed by the project.

Group counseling and group therapies receive little program focus. Any group approach is largely presented as an educational, re-educational, or informational model. The one de Novo program with a strong group discussion/group counseling feature – the street survival program for young prostitutes -- uses group discussions every other

week following the prior week's substantive program.

Educational programs receive strong emphasis. De Novo employs two part-time tutors, and the school board provides a third to teach basic skills, a GED program, and in effect, an alternative school for juveniles less than 16 years of age.

The project describes a substantial number of community agencies which provide important help to de Novo clients upon referral: the County Mental Health Program, Division of Vocational Rehabilitation, the Welfare Relief Agency, Concentrated Employment Program, college scholarship and counseling programs, family and alcohol programs.

De Novo Termination Procedures

Successful terminations require a written de Novo report submitted to the prosecutor prior to the date to which the hearing has been continued, the appearance of defendant in court with the screener, and a brief hearing where the court routinely dismisses the case without prejudice. De Novo's rate of dismissal recommendations has held fairly constant at 64-65% of their total project enrollment: Of the 598 participants covered under the DOL study, 384 were granted dismissal recommendations while the remaining 214 were returned to the court with no recommendation. A full 99% of all recommendations for dismissal were accepted by the courts. The Director, when queried about the 35% unsuccessful termination rate, indicated his feeling that staff should do more reaching out and follow-up with clients.

Unsuccessful termination from de Novo occurs largely because of a reoffense of "abscondance." However, no longer are reoffenders automatically excluded. Staff became aware that reoffense did not necessarily result in a conviction, and further, that reoffense by an otherwise cooperative de Novo participant, might result in a less severe sentence, if convicted.

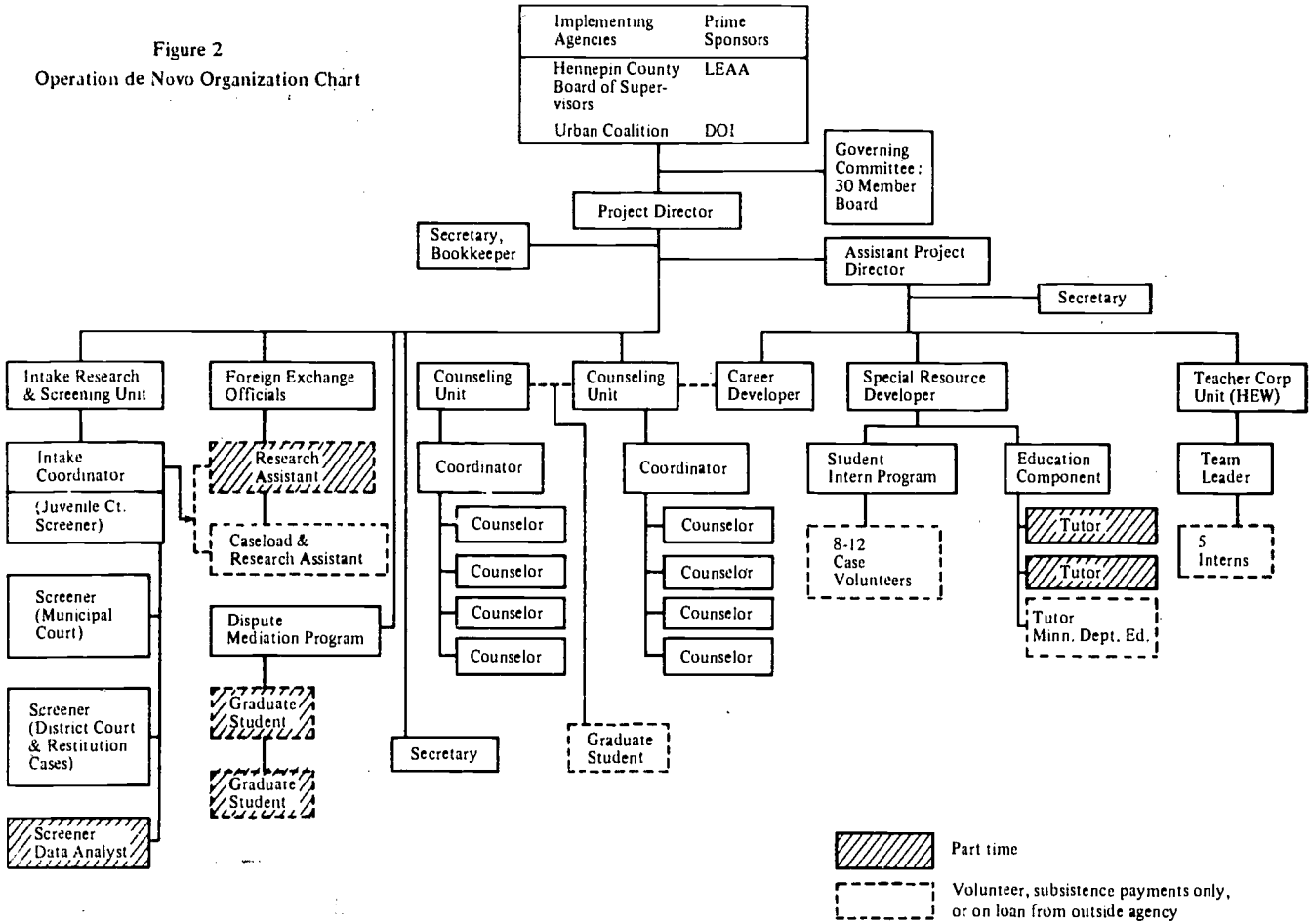
Staff increasingly seek to thwart unsuccessful termination by reviewing, with their participants, any failures to meet enunciated goals and searching with them for alternative ways to achieve them. Inactive participants now receive a letter from the project setting up a hearing with the staff and administration, which the participant is urged to attend, and where unsuccessful termination is deliberately considered.

Operation de Novo Organization

On the following page, Figure 2 describes de Novo's current organization. The roles and duties of all major positions are detailed below to provide additional background for later discussions of project management and service delivery. Only those

Figure 2

Operation de Novo Organization Chart



positions common to most projects are covered.

Counselors: The pre-trial intervention model specifically draws on the human relations skills of non-professionals and ex-offenders to provide individual counseling services. In de Novo, counselors have primary responsibility for their clients with caseloads seldom exceeding 25 participants. Counselors also coordinate the application of other supportive services including job placement, tutoring, and referrals to outside educational or community service agencies. To provide a career ladder for counselors, the project distinguishes these positions by Counselor I and II job titles. Counselor coordinators, generally professionals with at least a B.A. degree, are responsible for all training and supervision.

Screeners: The screening position requires the ability to communicate well with prospective participants and to establish a relationship of trust with the officers of the court. De Novo's screening staff have typically included non-professional community workers.

Special Resource Developer: This position involves liaison work with a range of outside community, social service, vocational and educational agencies as well as supervising the provision of special in-house educational services. In addition to monitoring volunteer tutorial activity, an intimate knowledge of available community services is essential to this position.

Project Administration: In de Novo, the director provides overall staff supervision, particularly supervision of line staff, while the Assistant Director more directly supervises support staff. The Director is advised on matters of policy by a Governing Committee consisting of 30 members who report to the Urban Coalition. Among this group are representatives of the community, local corporations, minority and ex-offender groups, police and court service agencies and the bench.

The program uses a humanistically-administered goals approach for clients and staff, within a very democratic milieu. Staff participate in hiring decisions (though final decisions rest with the director, who has never rejected staff recommendations for new staff, but has joined with staff in further interviews with applicants, in which consensus was reached). The weekly staff meeting is chaired each week by a different staff person: the director is present, but acts "of counsel." All staff, including the Director, rotate once about each 15 Saturdays to handle screening at the Saturday morning arraignments in Municipal Court.

The program is a rather interesting combination of quite competent professional leadership at the top, and a diversified people-oriented staff, which work in rather healthy tandem. Staff have been terminated, but they tend to terminate themselves as they realize they have failed to reach their goals, and that program goals have suffered.

Special Projects in Operation de Novo

Following the expiration of their initial grant with the Department of Labor, de Novo developed plans to expand the project's enrollment and service capability in several areas. Based on conversations with the Project Director, the status of these components (as of early 1974) is described below.

1. *Dispute Mediation Program* - a crisis intervention approach for the resolution of interpersonal conflict cases at the police-arrest stage. Program design and proposal development has been completed by two part-time graduate students. The proposal has been submitted to court officials and related agencies for endorsements and approval. No additional staff or funds will be required to implement this program as de Novo plans to use non-paid staff as mediators and will receive administrative assistance from the Probation Department.

2. *The Diversion of Restitution Cases.* This component which deals exclusively with felony defendants, is currently operating. During 1973, 48 restitution cases were accepted: 32 were assigned to counselors for full service, and 16 used de Novo as a conduit for payment only. Nearly $8,000 was collected and only three or four cases were lost through non-compliance. Although this aspect of the project is over a year old, as these figures indicate, the project has proceeded with extreme caution. The notion of diversion, rather than probation with an order for restitution, has been accepted primarily by corporate victims.

3. *Chemical Dependency Program* – the diversion of chronic alcoholic and drug-dependent defendants. At the time of our inquiry, an outside consultant was completing a 10-week assignment which involved proposal development and evaluation of the adequacy of outside treatment resources. (Diversion would be followed by treatment outside the project on an in-patient basis with referral back to the project after treatment for manpower services.) Additional resources will be required to enable hiring a single chemical dependency counselor.

4. *The Diversion of Federal Offenders.* The project has found it difficult to generate interest in this proposal and attributes this difficulty to the "law and order" orientation of the federal probation and parole office. Certain federal judges and prosecutors are quite interested but are awaiting congressional action on the proposed community services legislation.

5. *Less Emphasis on the Unemployed or Underemployed.* The project began accepting defendants with stable employment histories in response to the equal protection concerns of the bench. These are referred to as "paper" cases (and appear to be considered somewhat of a nuisance). De Novo maintains infrequent

client contact and reports back to the court only in the event of a rearrest or at termination. Eight to ten such cases have been diverted to date.

These new program components – which reflect the emergence of a more diversified service approach – in conjunction with the desire of program management to expand caseload levels, may result in more efficient allocation of services to more participants at lower per capita costs.

THE COURT RESOURCE PROJECT
Massachusetts' Pre-Trial Diversion Alternative

TCRP Project Design

Like Operation de Novo, The Court Resource Project (TCRP) was established in 1971 under Department of Labor funds to operate within the Massachusetts court system. The entry-level criminal justice system in Massachusetts consists of 73 District Courts. These "neighborhood courts" have jurisdiction over all misdemeanors and most felonies. The Court Resource Project was introduced into four such courts in 1971 as a program to:

- deliver effective manpower and social services to some of the city's most disadvantaged people;
- select and train street people and ex-offenders to perform as professional counselors;
- break into young adult offenders' incipient cycles of crime.

Conceived as an opportunity to increase alternatives to sentencing and to provide individual attention to first and less-serious offenders, the program was introduced cautiously to the conservative judicial system. The credibility it has achieved within the system is reflected in its expansion over two years into six more District Courts in the Boston area, with two more planned for 1974.

TCRP's involvement with its clients begins after the arrest and arraignment of the defendant, but before trial. Following a fourteen-day continuance for screening, orientation and assessment purposes, candidates who accept and are acceptable to the project and the courts, begin a ninety-day period of project service. Successful completion of the project leads to a recommendation for the dismissal of pending charges.

TCRP Eligibility Criteria and Participant Characteristics

Although originally developed to serve males with no more than one prior conviction, soon after operations began the program broadened its criteria to include a small number of women and a significant number of second and third offenders. Formal eligibility guidelines include the following criteria:

- Male or female;
- 17 to 26 years old (at the project's discretion, older cases have been accepted);
- Resident of the project area with a verifiable address;
- Not a drug addict;
- Unemployed or underemployed;
- Not charged with a felony outside of District Court jurisdiction (in a select

number of cases, alleged felons under Superior Court jurisdiction have been admitted);

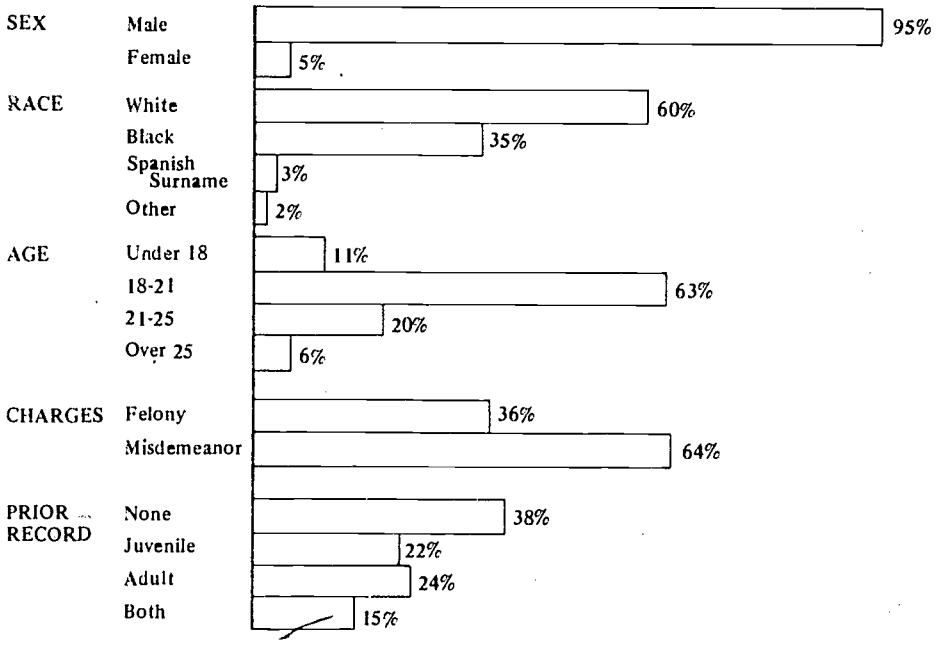
- No more than one or two prior convictions.

Figure 1 presents a breakdown of participants by selected demographic and entry characteristics. These figures are based on the first 327 participants who completed the project and were thereby included in the DOL study. Although more current statistics were not available, according to the project director, none of these distributions has changed substantially.

Figure 1

PARTICIPANT CHARACTERISTICS

(Terminations from Project Start-up Through June, 1973)



As these figures indicate, well over half of TCRP's early participants had prior records. (Two or more juvenile or adult priors were reported for a full 40% of participants.) Over 36% of the group were charged with felonies, the majority of these occurring in the categories of burglary, drug-related offenses, and assault.

TCRP Screening and Intake Procedures

TCRP screeners spend every morning in the courts reviewing the cards of new arrests and discussing potential candidates with the probation office, the clerks, public defenders, District Attorney, the defendants themselves, and often, the complainant or victim and arresting officer. If a defendant expresses interest in the project and all relevant parties concur, a ten-day continuance for further screening and evaluation is requested at arraignment.

The primary operational contact between the court and the project is through the screening process. TCRP screeners have done an exemplary job of fostering good relationships between the project and court-related agencies. For example, a very positive relationship has developed between the probation officers and the screeners. Probation officers have become a source of recommendations to the screeners who are viewed both as independent from and a part of the court system. Similarly, the clerks of the court have been most cooperative, accessing whatever information is available to them. Screening staff also confer with public defenders on a daily basis concerning possible referrals and the progress of particular project clients.

Following the preliminary screening process, the defendant is assigned a counselor or "advocate" and the intake process begins. The client and his advocate meet for a preliminary review of the client's needs and problems. A case conference is held, with key staff members, including the client's advocate and the court screener in attendance. They discuss possible services that can be provided and decide, on a preliminary level, whether or not the client should be accepted into the program.

Several months after the project's inception, the position of Client Orientation Director was created. His role is to conduct a two-day workshop for clients as a group while the acceptance decision is still pending. He performs two functions: he assists clients in evaluating the extent to which they are personally independent and their ability to financially insure this independence; and, he evaluates the ability of each of the prospective clients to respond favorably to the services of the program.

Following the orientation meetings, the client meets frequently with his advocate and career developer. Throughout the remainder of the assessment period, the purpose is to develop a plan mutually acceptable to project staff and to the defendant, and

adequate for presentation to the court.

Assessment techniques are used selectively according to the project staff's perceptions of the defendant's needs. For example, MEC tests may be administered to potential candidates for vocational training programs, simple reading tests are administered, school records, hospitalization records and other records are checked.

At the end of the continuance period, if both parties agree, a recommendation is made to the court to place the individual in the care of the project for a 90-day period.

Service Delivery in TCRP

TCRP services focus on individual counseling, career development and group work. All clients meet with their advocates at least once a week individually, and many advocates hold additional weekly group meetings. Each client also meets with a career developer who evaluates and implements career goals with the client and advocate. In addition to direct placements, both OJT and institutional job training programs receive heavy emphasis.

At the time of the visit, the project had recently established a small in-house educational program using volunteer tutors. Those who are referred outside the project for educational assistance generally work towards a GED at the evening public high schools.

In addition to the project's direct service capabilities, TCRP utilizes a variety of local community service agencies for supportive service assistance. A local medical center under contract with TCRP provides early physical examinations and follow-up treatment. The Massachusetts Rehabilitation Commission has a rehab counselor stationed at the TCRP facility and the Welfare Department has assigned an intake supervisor to the project. The welfare worker assists the project in developing client service plans and develops work incentive programs for TCRP clients.

TCRP Termination Procedures

Clients who complete a period of successful program participation, reappear in court accompanied by a screener. On a motion entered by the defendant and his or her counsel, charges will usually be dismissed. Favorable terminations were reported for 64% of all participants included in the DOL study. (A more recent project accounting indicates that for the nineteen-month period July 17, 1971 – February 15, 1973, 51% were terminated favorably, while for the 10½ month period from February 16, 1973 – December 31, 1973, 66% were terminated favorably.)

In the event a client demonstrates marked non-cooperation with the project (or is involved in a new law violation resulting in conviction) a termination letter is forwarded to the court and the client is subject to normal court procedures. Of all unsuccessful TCRP terminations covered by the DOL study, 19% were terminated due to a rearrest, 19% for abscondance, and 54% for general lack of cooperation including unsatisfactory attendance in a job, training or counseling program.

Although active participation formally ends with the project's recommendation, TCRP has reportedly instituted an intensive follow-up procedure: advocates are expected to maintain weekly contact with former participants for the first three months after termination and bi-monthly contact over the second three-month period.

TCRP Organization

Figure 2 provides an overview of the organization of TCRP. All staff report to the Director of Operations who oversees the day-to-day functions of all project components and has major personnel responsibilities. The Project Director acts as the major liaison with outside organizations and performs all financial and contract maintenance functions. A thirty-member advisory board meets quarterly to review project operations. The Board is comprised of representatives from the State Planning Agency, local business concerns, probation and corrections agencies.

Advocates are counselors, referral agents and follow-up workers. The selection of the project's advocates focuses on the candidate's ability to establish a relationship of trust with the project's clients. Advocates are frequently drawn from the ranks of ex-offenders without consideration of the candidates' educational background.

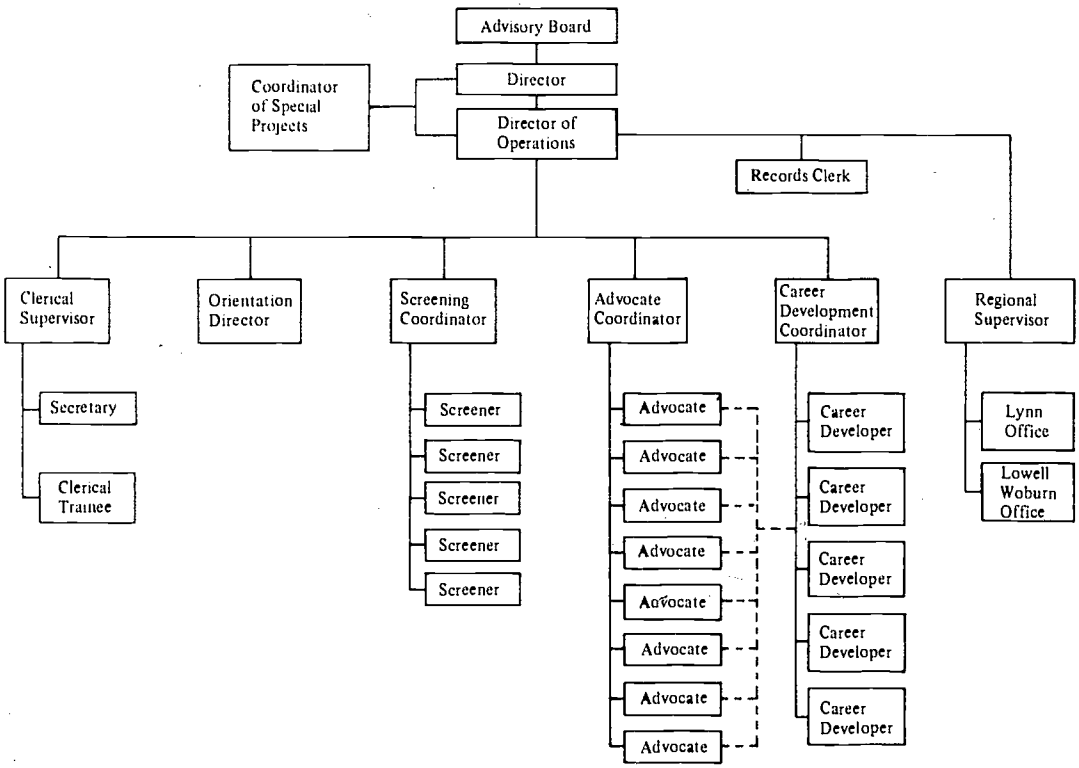
Each career developer is assigned the caseloads of two advocates. Due to their close working relationship with clients, they receive the same pre-service and in-service training as the advocates. TCRP's career developers have typically been college graduates with prior job development experience.

TCRP's screeners have brought a range of backgrounds and experience to the project (e.g. a former probation officer, an ex-alcoholic student, a former secretary). All, however, have shared a common ability to communicate comfortably with law enforcement and court personnel as well as the project's participants.

Advocates, Career Developers and Screeners each work under a unit supervisor who is directly responsible for all component supervision and coordination. In light of the project's strong ex-offender recruitment policies, TCRP has been fairly active in developing in-house staff training procedures and has produced a detailed manual entitled, "The Selection and Training of Advocates and Screeners for a Pre-Trial Intervention Program."

Figure 2

The Court Resource Project
Organization Chart



Special Projects in TCRP

Since its inception, TCRP has been administered by Technical Development Corporation, a private non-profit firm concerned with criminal justice program development and planning. By the end of March, 1974, sponsorship will be transfered to a new criminal justice agency, Justice Resource Institute (JRI) – an agency with a mandate similar to that of the Vera Foundation in New York. TCRP's former project director has assumed the position of executive director of JRI which will be responsible for the administration of TCRP as well as several related projects that have developed as a result of TCRP's diversion experience. These projects include:

- A diversion project for drug offenders. This program, which has recently accepted its first enrollments, offers detoxification and evaluation to drug dependent offenders admitted at various stages of the legal process. The program includes intensive residential treatment for 15 to 30 days with subsequent referrals to community-based treatment centers. Career developers work with clients from detoxification through post-placement follow-up.

- Late in 1973 LEAA funded a program for the Pre-Trial Diversion of Female Defendants to be administered as part of TCRP's ongoing program. The program includes basic TCRP services with the addition of child care, temporary housing and female oriented counseling. A supplementary research and training component will be oriented toward understanding and changing attitudes toward the female offender.

- A regional Advocacy program has also been funded by LEAA to provide counseling and supportive services to inmates returning to the community from Massachusetts prisons. The inmate, an assigned advocate, and the parole officer jointly develop a plan of service based on referral or purchase of service agreements with agencies in the community to which the offender plans to return.

- Another LEAA-funded program based on the TCRP model is a Model Adult Probation Project in the Cambridge Court. The full range of TCRP services are offered to selected defendants with the promise or dismissal of a lesser probation sentence for successful completers.

- Preliminary planning is underway for an Urban Court Program which will include citizen dispute settlement and victim restitution components.

THE DADE COUNTY PRE-TRIAL INTERVENTION PROJECT

Dade County Project Design

The Dade County Pre-Trial Intervention Project began operations in January, 1972. Like other such projects it was designed to achieve the dual goals of service to the defendant (through pre-trial counseling, vocational and educational support, as well as the possibility of a dismissed case) and the criminal justice system (through more responsive pre-trial screening, and relief for overburdened probation caseloads). Unlike many other projects, specifically the two reported in this volume, the Dade County Project is affiliated with the State Attorney's Office. Initially, the technical grantee for project funds was the Office of the County Manager. In October, 1972, the Office of the Court Administrator assumed project sponsorship. With strong back-up support from the State Attorney, the current project director furthered the original contacts with key justice system agencies and formed more specific selection criteria and project procedures. During this process the original concept – to divert cases after formal filing – was altered to permit and maximize the opportunity for pre-filing diversion.

Although the relationship with the State Attorney's Office has consistently been a close one, there is no official administrative connection between the project and that office. The State Attorney has provided office space, certain matching monies, the use of official stationary and the time of an administrative assistant to routinely approve project recommendations and terminate the court processing of appropriate project cases.

Dade County Eligibility Criteria and Participant Characteristics

Based on the project's goal of reaching first-offenders, eligibility criteria are defined as follows:

1. No prior criminal record;
2. Male or female between the ages of 17 and 25;
3. Charged with a misdemeanor or certain third degree felonies such as grand larceny, breaking and entering or unauthorized use of an automobile;
4. Dade County resident;
5. In need of services provided by the project;
6. Not a narcotics addict (experimental users are considered).

A seventh criterion, required of all participants, is the consent of the victim and the arresting officer involved in the case. Although neither party usually objects, project personnel feel that this stipulation has led to a more positive image of the program among police and the general public.

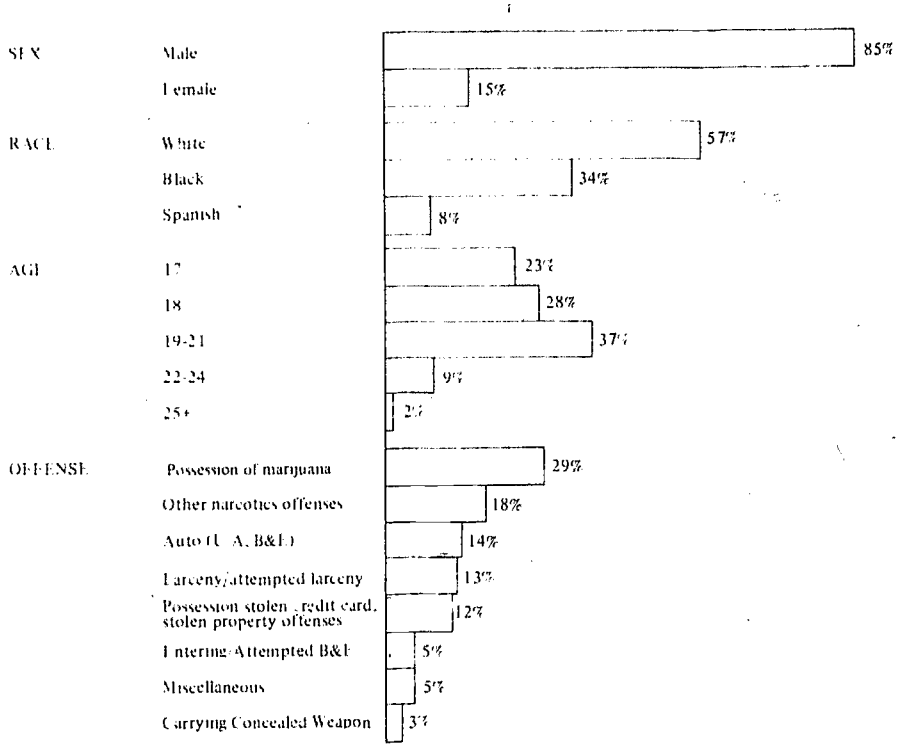
The Project Director indicated that while these criteria are fundamentally followed, in practice they are more broadly and flexibly applied. Some second offenders have been accepted at the discretion of the Project Director. Certain defendants with more serious felony charges have been accepted (armed robbery, aggravated assault, sale of narcotics, assault on a police officer), though these constitute a small percentage of project participants. The breaking and entering of a home, burglary, is apparently considered a more critically sensitive offense in Miami than in other cities, and is generally excluded.

Although no narcotics addicts are acceptable, almost half the participants have been charged with drug-related offenses. Since, by Florida law, possession of more than five grams of marijuana is a felony, the project is able to maintain its desired ratio of 2/3 felony cases. As of this writing, 76% of participants had entered the project on felony charges. Figure I shows a breakdown of selected participant characteristics for the 505 cases that received project services during its first eighteen months.

Figure 1

PARTICIPANT CHARACTERISTICS

January 1972 - July 1973



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Dade County Screening and Intake Procedures

Dade County PTI uses bond hearings as the primary method for participant identification. The Project Director or his secretary attend the hearings and scan police and PTR reports on all cases. Where the criteria for participation appear to be met, "Pretrial Intervention Project" is stamped on the court form. That same day, letters go out to the defendant, the victim and arresting police officer. The defendant is advised of the program and his eligibility and is asked to call the project office for an interview. The letter indicates that charges will not be filed if the defendant contacts the project within ten days. If the defendant does not respond, no outreach is attempted and the case is returned to the court calendar.

If he or she does respond, a counselor sets up an initial appointment. Based on a review of the arrest report, the initial interview and any prior criminal history, the project director makes a tentative acceptance decision. Final decisions are made at a weekly staff meeting. Assuming that the arresting officer and the victim approve, and that there are no extenuating circumstances, all candidates who desire to participate are accepted. The initial contact between the participant and project staff normally occurs within 10 to 14 days after arrest.

Additional cases are referred to the project by county judges, private and state attorneys, public defenders, and the pre-trial release project. The project's 18-month report indicates that of 979 cases identified as potential participants, 416 were found ineligible primarily due to failure to respond to the recruitment letter.

At the time of our inquiry, applicants, once accepted, were placed in one of several disposition groups. *Group I* consists of those cases acceptable to the program which have been diverted before arraignment, waiving speedy trial and a preliminary hearing. Successful Group I participants need never appear in court; a "No Information" is filed after the three to six month participation period is complete. *Group II* cases are those which have been filed due to victim or police rejection of non-filing, the existence of co-defendants, or post-filing referral from attorneys or judges (not infrequently these are more serious charges). Successful participation in Group II results in deferred prosecution and formal probation. *Group II-M* cases are misdemeanor cases filed in County Court, over which the State Attorney's Office has no jurisdiction. Successful Group II-M participants receive a nolle pros recommendation. *Group III* cases are those in which the participant's case is no longer pending, but the individual desires to participate in the program regardless.

Dade County Service Delivery

Counseling is the primary focus of the program's service delivery strategy. All participants are required to attend one individual and one group counseling session per week. Caseloads are grouped on a geographic basis with a maximum of 20 cases per counselor.

According to the Director, the specific goal of counseling activities is personal growth and development. In addition to dealing with specific individual and family problems, sessions are designed to increase an individual's awareness of him or herself and his or her effect on other people, and to heighten the ability to relate more openly and honestly to individual and group situations.

Apart from the strong emphasis on counseling support, there appeared to be limits on the *coordinated* services staff is able to provide. Vocational training opportunities in the area are limited although the Division of Vocational Rehabilitation has been somewhat helpful. Job placements have been difficult. The job developer (a counselor aide) estimated that he made 40 to 50 contacts a month (partly through the assistance of the Chamber of Commerce and the State Employment Service job bank listings), which resulted in about 10 acceptances – the majority unskilled positions in factories or grocery stores at wages generally between $1.90 and $2.50 per hour. Clearly, the fairly tight Miami job market, the circumstances of the project's job applicants (unskilled youth, often black), and the lack of emphasis on this component within the project, have combined to produce limited success in the area of job development.

In addition, outside educational resources have not been used as extensively as had been hoped; in-house educational assistance has been limited; and community health and mental health services have not tended to graciously receive project participants.

Project objectives focus on the defendant of lower economic class, emphasizing the need to provide expanded opportunities, to promote upward mobility and thereby theoretically reduce criminal activity. While this group participates in the project, there is also a substantial group, possibly a more substantial group, of non-economically disadvantaged participants. In short, given the nature of the project's target group, the predominant emphasis on counseling support is perhaps justified.

Dade County Termination Procedures

Successful termination of participants is the decision of the case counselor, the assistant administrator, and the project consultant. The Project Director routinely approves termination at an informal conference in his office with the defendant and his or her parents. The defendant does not appear before the court upon successful termination. The Project Director, following routine approval by the administra-

tive assistant to the State Attorney, submits a communication to the court that no criminal information will be filed. Reportedly, this disposition is entered into the criminal justice information system which will reflect successful completion of the program.

Over a two-year period, January 1972 through January 1974, a combined total of 566 Group I and II participants were terminated from the project, 437 or 77% with a favorable project recommendation.

As Table I indicates, Group I participants, comprising the majority of the project's diversion cases, have consistently exhibited lower rates of unsuccessful termination than the project's Group II participants. Since successful completion in Group II cases does not guarantee a dismissal of charges but rather a period of probation not to exceed two years, the higher in-project failure rate of this group may be a reflection of reduced participant incentive.

Table I

Termination Rates

	1/72 - 1/73		1/73 - 1/74		Cumulative	
Group I (non-filed)						
Successful	71	(79%)	278	(87%)	349	(85%)
Unsuccessful	19	(21%)	42	(13%)	61	(15%)
Group II (filed)						
Successful	34	(52%)	54	(60%)	88	(56%)
Unsuccessful	32	(48%)	36	(40%)	68	(44%)

Unsuccessful termination may occur by an individual counselor advising the defendant he or she has been deselected, or by a counseling group's decision that the defendant's behavior merits deselection. Termination is usually based on clear evidence of non-cooperation including: a re-offense; dropping out of an educational program without informing the project; not working and not seeking a job; failure to appear for a number of counseling sessions; smoking marijuana out in front of the project office before or after a group meeting. Defendants who are unsuccessfully terminated are not routinely advised of any right to appeal this decision, but if they ask, the counselor may advise them they can appeal to the Project Director. On occasions, the Director has reinstated a defendant.

Dade County PTI Organization

Figure 2 depicts the general organization of the project; specific staff roles are described below.

Project Director: The Project Director maintains an office in the State Attorney's Office. His major duties are to maintain coordination between the project and the State Attorney's Office and to select project participants at bond hearings. Recommendations concerning case dispositions may be made by the Project Director without further validation by the State Attorney's Office.

Consultants: Two psychologists are used by the project as professional consultants. One, who works about two-thirds time, supervises all psychological and aptitude testing. In addition, he co-leads group sessions with counselors and provides family counseling services. The second, who gives the project about six hours a week, participates in weekly counseling staff meetings. He leads a therapy group for participants who need a more intensive group experience, leads a parents' group, and is in charge of research and staff training.

Counselors: There are presently 9 staff counselors. The Chief counselor assists in the training of new counselors by having them accompany him on home visits and field contacts. He also advises counselors on problem cases.

Counselors generally carry a maximum of 20 cases. Each client must be seen individually once a week either in the office or in the field. Counselors also lead a compulsory group meeting for all their clients once a week. Counselors are required to spend one day a week in the office to meet new clients and schedule appointments. They receive both on-the-job and in-service training from the chief counselor and the two consultants.

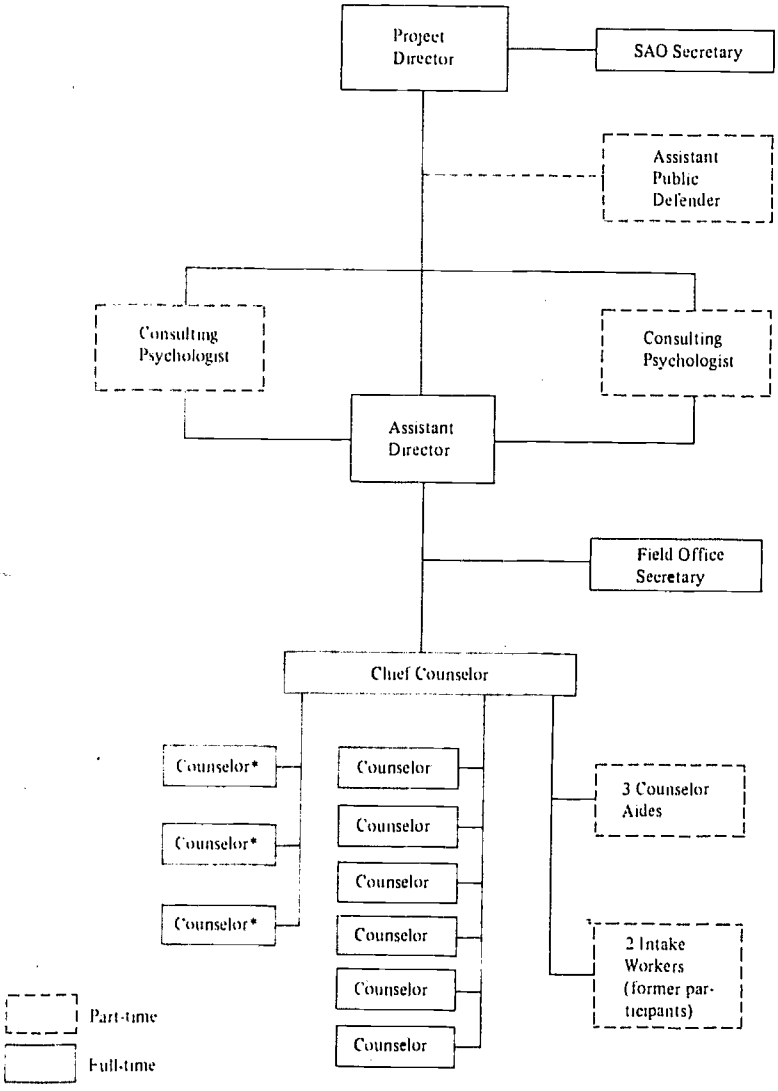
Counselor-Aides: A new position established nine months ago, counselor-aides are students in Dade Community College's New Careers Program. They attend classes two days a week and work in social agencies three days. The project signed a two-year contract with Dade to support three counselor-aides per semester. One aide has been designated a Job Developer, a role that has been unfilled since the assistant director stopped serving that function.

Counselor-aides do initial interviews of new candidates and administer initial tests. Two former project participants, who work at the project office on a part-time basis, also interview new candidates.

Other Staff: In addition to project staff described above, an Assistant State Attorney serves part-time to review all potential PTI cases. Another staff member of the State

Figure 2

Dade County Pre-Trial Intervention Project
Organization Chart



* Funded by the Miami Treatment Alternatives to Street Crime Program.

Attorney's Office is in charge of case dispositions and plea negotiations. Finally, an Assistant Public Defender is assigned to the project to advise potential participants and represent indigent participants at court appearances.

No advisory panel or project review board has been established. According to the Director, such a panel has not been considered necessary in light of the informal relationships that have developed with the police, defense counsel, rehabilitative services, and the courts.

Special Projects Associated With Dade County PTI

At the present time, project expansion or diversification plans are not extensive. Although project administration and staff look forward to expanded eligibility criteria, over the first 18 months of operations the project has chosen to move carefully and limit its risks. Since the Dade effort is the youngest of the three projects under consideration, this position is not inconsistent with the still somewhat experimental nature of pre-trial intervention in Dade County.

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